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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 100.

THE ATLANTIC AND PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT MINGUS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED APRIL 18, 1894.

(15,578.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1896.

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a Be it remembered that heretofore, to wit, on the third day of June, in the year one thousand eight hundred and ninety-three, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of the record of a certain cause wherein Atlantic and Pacific Railroad Company was plaintiff in error and Robert Mingus was defendant in error; which said transcript is in the words and figures following, to wit:

1 *Transcript of Record.*

Pleas before the Honorable James O'Brien, chief justice of the supreme court of the Territory of New Mexico and judge of the fourth judicial district court thereof, at a regular term of said district court, begun and held in and for the county of San Miguel, at the court-house, in the town of Las Vegas, commencing on the 7th day of November, A. D. 1892.

THE ATLANTIC & PACIFIC RAILROAD CO.
vs.
ROBERT MINGUS. } Ejectment. No. 4117.

Be it remembered, that heretofore, to wit, on the 28th day of March, 1892, the said plaintiff filed in the clerk's office of the fourth judicial district for the Territory of New Mexico, its declaration, which said declaration is in words and figures as follows, to wit:

Declaration.

TERRITORY OF NEW MEXICO, } *ss*:
County of San Miguel, }

In the District Court for the Fourth Judicial District in and for the County of San Miguel, at the April Term, A. D. 1892, Thereof.

To the Honorable James O'Brien, chief justice of the supreme court of said Territory and judge of said district court:

The Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an act of the Congress of the United States, and thereby duly empowered to acquire and hold real estate, and to sue and be sued, and doing business within the Territory of New Mexico, in conformity with the laws thereof, and having its principal place of business within the said Terri-
2 tory, at the city of Albuquerque, in the county of Bernalillo, plaintiff, complains of Robert Mingus, a resident of the county of San Miguel, Territory aforesaid, in a plea of ejectment:

For that, whereas, heretofore, to wit, on the 28th day of March, A. D. 1892, at the county of San Miguel aforesaid, the said plaintiff was entitled to the possession of the following-described lot or parcel of land and real estate, situate, lying and being in the county of San

Miguel, and Territory of New Mexico, to wit: the north one-half of the northwest quarter, and the northwest quarter of the northeast quarter of section No. 5, township No. 7, north of range twenty-six east, of the New Mexico meridian, containing one hundred and twenty acres of land.

And afterwards, to wit, on the day and year aforesaid, at the county aforesaid, the said defendant entered into said premises, and unlawfully withheld, and thence hitherto hath unlawfully withheld, and still doth unlawfully withhold from the plaintiff the possession of the premises aforesaid; to its damage in the sum of five hundred dollars. And plaintiff avers that the monthly value of the rents and profits of said premises is fifty dollars.

Wherefore, plaintiff brings suit, and prays judgment of this honorable court for the recovery of the possession of said premises, and for the sum of five hundred dollars, its damage aforesaid, and the sum of fifty dollars per month from the present time until it is let into possession, and for the costs of this suit.

FRANK SPRINGER,
Attorney for Plaintiff.

And afterwards, to wit, on the 19th day of November, A. D. 1892, there was filed in the office of said clerk, the plea of the defendant and joinder of issue thereon, in words and figures as follows, to wit:

3 In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of San Miguel, November Term, 1892.

THE ATLANTIC & PACIFIC RAILROAD CO.
vs.
ROBERT MINGUS. } Ejectment. No. 4117.

Now comes the defendant, Robert Mingus, by Long & Fort, his attorneys, and defends the wrong and injury when, etc., of which the plaintiff in *his* above declaration complains, and says, that he is not guilty of unlawfully withholding the lands and tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself upon the country, etc.

LONG & FORT,
Attorneys for Defendant.

And the plaintiff doth the like.

FRANK SPRINGER,
Attorney for Plaintiff.

At a regular term of the district court of the fourth judicial district of the Territory of New Mexico, begun and held within and for the county of San Miguel, at the court-house of said county, in the town of Las Vegas, New Mexico, on the 7th day of November, A. D.

1892, for the trial of causes arising under the laws of the Territory of New Mexico.

Present: Hon. James O'Brien, chief justice; Hon. Lewis C. Fort, district attorney; Jose L. Lopez, sheriff; M. A. Otero, clerk.

And afterwards, to wit, on Saturday, December 10th, 1892, the same being the thirtieth day of said term of court, the following, among other proceedings, were had, to wit:

4 THE ATLANTIC & PACIFIC RAILROAD CO. *vs.* ROBERT MINGUS. } Ejectment. No. 4117.

Comes now the plaintiff in the above-entitled cause, by its attorney, Hon. Frank Springer, and comes also the defendant, by his attorneys, Messrs. Long & Fort, and issue having heretofore been joined, comes the following jury, to wit: Trinidad Garcia, Salvador Gonzales, Pedro Jose Griego, Juan Maes, Senobia Gonzales, Miguel A. Duran, Luis Marquez, Serapio Ortiz, Manuel Bustus, Jose de los Reyes Abeytia, Juan Maria Blea, Jose Ynez Padilla, twelve good and lawful men taken from the body of the county, who are duly sworn the truth to speak upon the issues joined, hear the evidence, argument of counsel, and under the direction of the court the jury return the following verdict:

THE ATLANTIC & PACIFIC RAILROAD CO. *vs.* ROBERT MINGUS. } Ejectment. No. 4117.

We, the jury in the above-entitled cause, find the defendant not guilty.

JUAN MA. BLEA, *Foreman.*

Comes now the plaintiff, by its attorney, Mr. Frank Springer, and files its motion for a new trial, which said motion is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, *County of San Miguel.*

In the District Court for the Fourth Judicial District in and for the County of San Miguel, at the November Term, 1892.

THE ATLANTIC & PACIFIC RAILROAD CO. *vs.* ROBERT MINGUS. } Ejectment. No. 4117.

Motion for a New Trial.

5 The plaintiff in the above-entitled cause, by its counsel, now moves the court to set aside the verdict of the jury returned therein, and grant a new trial of said cause, upon the following grounds, to wit:

I.

For error in admitting in evidence the patent and deeds offered by defendant, over plaintiff's objection.

II.

For error in admitting in evidence the act of Congress of July 6th, 1886, over plaintiff's objection.

III.

For error in denying plaintiff's motion to direct the jury to find for the plaintiff.

IV.

For error in refusing the instructions requested by the plaintiff.

V.

For error in giving to the jury the instructions to find a verdict of not guilty.

VI.

Because the verdict is contrary to the law of the case.

FRANK SPRINGER,
Attorney for Plaintiff.

Which said motion is denied by the court, and to which ruling of the court plaintiff then and there excepted.

And afterwards, to wit, on Saturday, December 10th, 1892, the same being the thirtieth day of said term of the district court, the following, among other proceedings were had, to wit:

THE ATLANTIC & PACIFIC RAILROAD CO.
vs.
ROBERT MINGUS.
} Ejectment. No. 4117.

Comes now the plaintiff in the above-entitled cause, by Frank Springer, Esq., its attorney, and moves the court to set aside
6 the verdict of the jury returned therein, and grant a new trial of said cause, upon the grounds set forth in the motion this day filed; and after hearing argument of counsel, and due consideration being had thereon, the said motion is by the court denied, to which ruling of the court the plaintiff then and there excepted.

It is therefore considered and adjudged by the court that the defendant, Robert Mingus, go hence without day, and that the plaintiff pay the costs of this suit to be taxed, and that execution issue therefor.

It is further ordered by the court that the plaintiff have sixty days from this date in which to file record and bill of exceptions.

And afterwards, to wit, on the 20th day of January, A. D. 1893, the said plaintiff filed in the office of said clerk a bill of exceptions in said cause, which is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

In the District Court for the Fourth Judicial District, Sitting within and for the County of San Miguel.

THE ATLANTIC & PACIFIC RAILROAD CO. }
vs. } Ejectment. No. 4117.
ROBERT MINGUS. }

The plaintiff in the above-entitled cause proposes the following as the record and the bill of exceptions upon which the judgment of the district court therein may be reviewed by the supreme court of the Territory of New Mexico, to wit:

1. The declaration.
2. The plea with joinder of issue thereon.
3. Record entry of trial and verdict of jury.
4. Motion for new trial.
5. Record entry of order denying motion for new trial and of judgment upon the verdict.
6. The following bill of exceptions:

7 *Bill of Exceptions.*

Be it remembered, that on the trial of the above-entitled cause, at the regular November term of said court, on the 10th day of December, A. D. 1892, before the Honorable James O'Brien, chief justice, and a jury, the following proceedings were had, to wit:

In the District Court for the Fourth Judicial District, Sitting within and for the County of San Miguel, Territory of New Mexico, November Term, A. D. 1892.

THE ATLANTIC & PACIFIC RAILROAD CO. }
vs. } Ejectment. No. 4117.
ROBERT MINGUS. }

This cause was tried before Chief Justice O'Brien and a jury, December 10th, 1892.

Appearances: For plaintiff, Mr. Frank Springer; for defendant, Messrs. Long & Fort.

Jury called and sworn.

Opening statement of plaintiff's case made by Mr. Springer.

Mr. SPRINGER to Court:

If it please your honor, this case is one which will turn entirely upon a question of law, which I presume will be determined by your honor, by an instruction to the jury, one way or the other. The evidence is for the most part documentary, and in the form of

testimony taken by deposition, all of which is quite voluminous. It seems to me a needless consumption of time to read to the jury all of the lengthy documents and depositions which I intend to offer in evidence, as they are introduced; but I believe it will be sufficient if I state the substance of them as we go along, reading at length only such parts as the court or opposite counsel may desire to hear, or as may be deemed material for the jury, in case any issue of fact shall be left to the jury.

The COURT: Is there any objection to the course proposed?

8 Mr. FORT: We have none.

The COURT: You may proceed in that way.

Mr. SPRINGER: I offer in evidence the act of Congress of the United States, approved July 27, 1866, incorporating the Atlantic and Pacific Railroad Company, which is marked Exhibit No. 1, and is as follows:

EXHIBIT No. 1.

An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast.

Be it enacted, &c., That John B. Brown, Anson P. Morrill, Samuel F. Hersey, William G. Crosby, Samuel E. Spring, Samuel P. Dinsmore, of Maine; N. S. Upham, Frederick Smyth, Onslow Stearns, S. G. Griffin, William E. Chandler, of New Hampshire; T. W. Parke, H. H. Baxter, John Gregory Smith, A. P. Lyman, of Vermont; Walter S. Burges, William S. Slater, Stephen Harris, Thomas P. Shepard, of Rhode Island; William Merritt, Alexander H. Bullock, George L. Stearns, Genery Twitchell, Charles H. Warren, Chester W. Chapin, of Massachusetts; John Boyd, Robert C. Wetmore, John T. Wait, Cyrus Northrop, of Connecticut; Solon Humphreys, J. Bigler, Homer Ramsdell, Isaac H. Knox, John A. C. Gray, Daniel L. Ross, A. V. Stout, M. K. Jessup, R. E. Fenton, E. L. Fancher, J. C. Fremont, James Hoy, Jesse M. Bowles, Edward Gilbert, James P. Robinson, Oliver C. Billings, of New York; Charles Bachelor, John Edgar Thompson, Morton McMichael, T. Haskin Du Puy, Thomas A. Scott, Charles Rickettson, William Lyon, George W. Cass, Levi Parsons, of Pennsylvania; Charles Knap, J. L. N. Stratton, James B. Dayton, Robert F. Stockton, Alexander G. Cattell, A. W. Markley, of New Jersey; John W. Garrett, Charles J. M. Gwinn, Robert Fowler, Jacob Tome, Thomas M. Lanahan, of Maryland; Charles J. Dupont, Henry Ridgley, Andrew C. Gray, Nat. Smythers, of Delaware; Bellamy Storer, George B. Senter, William Baker, Samuel Galloway, David Tod, Charles Anderson, Bird B. Chapman, Edward Sturgis, Israel Dille, of Ohio; Edwin Peck, William D. Griswold, James P. Luse, Samuel E. Perkins, Conrad Baker, of Indiana; Richard J. Oglesby, N. B. Judd, Samuel

9 A. Buckmaster, D. L. Phillips, L. P. Sanger, of Illinois; Eber B. Ward, Omer D. Conger, Nathaniel W. Brooks, Alexander H. Morrison, of Michigan; Z. G. Simmons, Alexander Mitchell, J. J. Williams, G. A. Thompson, J. J. R. Pease, John H. Hersey, of

Wisconsin; Henry A. Smith, Sherman Finch, William Mitchell, R. F. Crowell, L. F. Hubbard, E. F. Drake, of Minnesota; Lyman Cook, Platt Smith, Jacob Butler, Henry I. Reid, Hoyt Sherman, of Iowa; William G. Brownlow, of Tennessee; Thomas C. Fletcher, B. R. Bonner, John M. Richardson, Emil Pretorious, E. W. Fox, R. J. McElheny, Charles H. Howland, Madison Miller, George W. Fishback, T. J. Hubbard, George Knapp, Charles K. Dickson, A. G. Braun, G. L. Hewitt, P. A. Thompson, James W. Thomas, Charles E. Moss, Edward Walsh, A. R. Easton, Truman J. Horner, J. B. Eads, D. R. Garrison, W. A. Kayser, George P. Robinson, of Missouri; Thomas E. Bramlette, Benjamin Gratz, C. E. Warren, Lazarus W. Powell, John Mason Brown, Joshua Speed, of Kentucky; Solon Thatcher, Jacob Stotter, William B. Edwards, James G. Blunt, Robert McBratney, of Kansas; Harrison Hagaus, James Cook, Robert Crangle, Benjamin H. Smith, of West Virginia; Lorenzo Sherwood, A. J. Hamilton, of Texas; William Gilpin, Henry C. Leach, of Colorado; Phinneas Banning, Timothy G. Phelps, William B. Carr, Edward F. Beale, Fred. F. Lowe, Benj. B. Redding, B. W. Hathaway, Leonidas Haskell, Frederick Billings, of California; W. S. Ladd, J. R. Moores, Walter Monteith, John Kelly, B. F. Dowell, of Oregon; James L. Johnson, Henry Connelly, F. Perea, of New Mexico; J. H. Mills, A. P. K. Safford, E. S. Davis, of Nevada; King S. Woolsey, William H. Hardy, Coles Bashford, of Arizona; Henry D. Cooke, of the District of Columbia; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque, on the river Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas, at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act, as herein

set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Atlantic and Pacific Railroad Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner hall, in the city of Saint Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall appoint, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, once a week for at least four weeks previous to the day of the meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the
11 amount thereof, as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and in case of their absence or inability any two of the officers of said board, shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer, and secretary shall then deliver over to said directors all the moneys, properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and

determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen), and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

12 SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in length on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in a donation to the road named in the act.

SEC. 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under

13 the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of

land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Atlantic and Pacific railroad."

SEC. 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five
14 additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

SEC. 5. And be it further enacted, That said Atlantic and Pacific railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: Provided, that the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United

States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

15 SEC. 7. And be it further enacted, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that

may arise upon such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole
16 cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken as aforesaid shall be held by an infant, *femme covert*, *non compos*, insane person, or persons residing without the Territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee-simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given to and
17 accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred seventy-eight.

SEC. 9. And be it further enacted, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the condi-

tions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. And be it further enacted, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. And be it further enacted, That said Atlantic and Pacific railroad, or any part thereof, shall be a post-route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

SEC. 12. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

SEC. 13. And be it further enacted, That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall
18 be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. And be it further enacted, That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. And be it further enacted, That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company,

the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And
the said board of directors shall have power to appoint
19 such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. And be it further enacted, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Cincinnati, Saint Louis, Memphis, and Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. And be it further enacted, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: Provided, that any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

SEC. 18. And be it further enacted, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point, near the

boundary line of the State of California, as they shall deem
20 most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for.

SEC. 19. And be it further enacted, That unless the said Atlantic and Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

SEC. 20. And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act.

SEC. 21. And be it further enacted, That whenever in any grant of land or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges, and pay of said directors, engineers, commissioners, or agents, shall be paid by the respective companies. Said directors, engineers, commissioners, or agents shall be paid for said services the sum of ten dollars per day, for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily travelled, in discharging the duties required of them, which *per diem* and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payments, no more patents for lands or other subsidies shall be issued to said company until these requirements are complied with.

21 Mr. SPRINGER: I offer in evidence exemplified copy, from the files of the Interior Department, showing organization of the company October 1st, 1866. Election of directors and officers. Subscription of $1,000,000 stock, with 10 per cent. of the same paid up; and other matters, which is marked Exhibit No. 2, and is as follows:

EXHIBIT No. 2.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, with its endorsement, and of its enclosure, on file in this department.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

Office of the Atlantic and Pacific Railroad Co., 54 William St.

NEW YORK, *Dec. 6th*, 1886.

Hon. O. H. Browning, Secretary of the Interior, Washington city, D. C.

SIR: Herewith we forward to you the report of the proceedings in detail of the board of commissioners of the Atlantic and Pacific Railroad Company, created under an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean." Approved, July 27th, 1866.

We have complied with all the requirements of the law, and have delivered the books, papers, etc., belonging to the said board of commissioners to the possession of the board of directors elected 22 by the subscribers to the capital stock of the Atlantic and Pacific Railroad Company, who were duly elected in pursuance of law.

Respectfully yours, J. C. FREMONT, *President.*

CHAS. H. HOWLAND,
Secretary of Board of Commissioners of Atlantic and Pacific Railroad.

(Indorsement:) New York, Dec. 6th, 1866. J. C. Fremont, pres't, forwards report of board of commissioners of the Atlantic and Pacific R. R. Ack. Dec. 14th, 1866.

Report of the Board of Commissioners of the Atlantic and Pacific Railroad Company.

Copy of the minutes of the proceedings of the commissioners appointed to superintend the organization of the Atlantic and Pacific Railroad Company.

In pursuance of law, agreeable to the requirements of section 1 of an act, entitled "An act granting lands to aid in the construction of

a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, the following notice was duly published:

Notice is hereby given that, under and in pursuance of an act passed at the first session of the Thirty-ninth Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," a meeting of the commissioners named in said act is hereby called to meet at the Turner hall, in the city of Saint Louis, Missouri, on the first day of October, A. D. 1866, at 12 o'clock, noon, of that day, for the purpose of choosing a president, vice-president, secretary, and treasurer, as in said act prescribed, and for the transaction of such other business as may be by such act provided for.

Dated, St. Louis, Mo., Aug. 16th, 1866.

(Signed by) THOMAS C. FLETCHER,
E. PREETORIOUS,
TRUMAN J. HOMER,
ALLEN R. EASTON,
23 GEORGE KNAPP,
B. R. BONNER,
JAMES B. EADS,
GEORGE T. ROBINSON,
CHARLES H. HOWLAND,
WM. A. KAYSER,
MADISON MILLER,
CHARLES E. MOSS,
GEO. L. HEWITT,
R. J. McELHANEY,
Commissioners for Missouri.

TURNER'S HALL, ST. LOUIS, MO., *October 1st*, 1866.

In accordance to a call published, signed by the commissioners from the State of Missouri, and in pursuance of the requirements of an act, passed at the First session of the Thirty-ninth Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and the Pacific ocean," approved July 27th, 1866, the board of commissioners named in said act met for organization at Turner hall, in the city of St. Louis, Missouri, on the first day of October, anno Domini, 1866, at the hour of twelve o'clock at noon.

The meeting was called to order by Hon. Emil Preetorious, commissioner from Missouri, upon whose motion Hon. Levi Parsons, commissioner from Pennsylvania, was chosen chairman. On motion of Samuel P. Dinsmore, from Maine, Charles H. Howland, commissioner from Missouri, was chosen secretary of the meeting.

On a call of the roll the following commissioners were present, viz: Samuel P. Dinsmore, of Maine; John C. Fremont, of New York; Jesse M. Bolles, of New York; James P. Robinson, of New York; Oliver P. C. Billings, of New York; Levi Parsons, of Penn-

sylvania; Bird B. Chapman, of Ohio; Israel Dille, of Ohio;
24 John H. Hersey, of Wisconsin; William Mitchell, of Minnesota; Benj. R. Bonner, of Missouri; Emil Preetorious, of Missouri; E. W. Fox, of Missouri; Charles H. Howland, of Missouri; Madison Miller, of Missouri; George L. Hewitt, of Missouri; Charles E. Moss, of Missouri; Allen R. Easton, of Missouri; James B. Eads, of Missouri; Charles K. Dickson, of Missouri; George W. Fishback, of Missouri; Daniel R. Garrison, of Missouri; William Gilpin, of Colorado; Leonidas Haskell, of California; John Boyd, of Connecticut.

On motion of Samuel P. Dinsmore, it was

Ordered, that the bond of the treasurer shall be for the sum of one hundred thousand dollars, the sureties to be approved by the president and secretary.

On motion of Charles Moss, the meeting proceeded to the election by ballot of a president, vice-president, secretary, and treasurer.

Messrs. Samuel P. Dinsmore, of Maine, and Bird B. Chapman, of Ohio, were appointed tellers by the chair.

The chair announced the result of the ballot to be as follows:

Whole number of votes cast twenty-four. Of these there were cast for president, for John C. Fremont, twenty-three; for vice-president, for Daniel R. Garrison, of Missouri, twenty-three; for Thomas A. Scott, of Pennsylvania, one; for secretary, for Chas. H. Howland, of Missouri, twenty; for Benj. R. Bonner, of Missouri, four; for treasurer, for James P. Robinson, of New York, twenty-one; for Charles K. Dickson, three; resulting in the election of, for president, John C. Fremont; vice-president, Daniel R. Garrison; secretary, Chas. H. Howland; treasurer, Jas. P. Robinson.

On motion of Madison Miller, of Missouri, a committee of two was appointed to conduct the president to the chair.

The chair appointed Madison Miller and E. W. Fox, of Missouri, said committee.

25 On motion of Samuel P. Dinsmore, of Maine, it was

Ordered, that the president and secretary of the board of commissioners, be and the same are hereby directed to open books for subscription to the capital stock of the Atlantic and Pacific Railroad Company, in the city of Saint Louis, State of Missouri, (in parlor No. six at the Southern hotel), on the second day of October, A. D. 1866, at 10 o'clock in the forenoon, and that they issue the notice for the first meeting of the stockholders in pursuance of an act, passed at the First session of the Thirty-ninth Congress, incorporating said company, and entitled "An act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean."

On motion of——, it was

Resolved, That General J. C. Fremont be requested to write out the interesting remarks he has just addressed us, for publication.

On motion of James B. Eads, of Missouri, it was

Ordered, that the thanks of this board of commissioners be tendered to Hon. B. Gratz Brown, Senator from Missouri, and the originator in the Senate of the act incorporating this company; to

the members of the Missouri delegation in Congress from other States who labored for and secured the passage of said act.

On motion of——, the thanks of this meeting were tendered to the Hon. Levi Parsons, of Pennsylvania, for his labors in securing the organization of the company.

The board then adjourned to meet at the call of the president.

The secretary having qualified by oath as required by law, as follows:

STATE OF MISSOURI, }
City and County of St. Louis. }

On this second day of October, in the year one thousand,
26 eight hundred and sixty-six, before me, John McNiel, clerk of the criminal court of Saint Louis county, State of Missouri, personally came Charles H. Howland, to me personally known, and made oath that having been elected secretary of the board of commissioners, created under an act of Congress incorporating the Atlantic and Pacific Railroad Company, he would faithfully discharge his duty in said office to the best of his ability.

(Signed) CHAS. H. HOWLAND.

Sworn to before me this 2d day of Oct. 1866.

(Signed) JNO. McNIEL,
Clerk Criminal Court, St. Louis County.

[Seal of St. Louis Co. Criminal Court.]

The following is a copy of the bond of the treasurer:

Know all men by these presents, that we, James P. Robinson, of New York, as principal, and Frederick Billings, of the State of California, and Levi Parsons, of New York State, as sureties, are holden and stand firmly bound unto the Atlantic and Pacific Railroad Company, a corporation created by act of Congress of the United States of America, in the full and just sum of one hundred thousand dollars to the said company, their successors and assigns, well and truly to be paid.

Sealed with our seals, and dated this second day of October, in the year of our Lord one thousand eight hundred and sixty-six.

The condition of the foregoing obligation is such, that, whereas, at a meeting of the board of commissioners of said company, duly called and held at the Turner hall, in the city of Saint Louis, on the first day of said October, said Robinson was duly chosen treasurer as named in the first section of the said act incorporating said company and has accepted the said office.

Now, therefore, if the said Robinson shall well and truly do and perform the duties of said office, and shall well and truly keep and on proper warrant pay over and deliver all such monies and valuables as shall come into his possession as treasurer as aforesaid, and shall well and truly observe all and singular the provisions of said

act, and of any subsequent acts amendatory thereof, so far as
27 they may relate to said office, then this obligation shall be and become null and void, otherwise in full force and virtue.

(Signed) J. P. ROBINSON. [SEAL.]
FREDERICK BILLINGS. [SEAL.]
LEVI PARSONS. [SEAL.]

Signed, sealed and delivered in presence of—
CHAS. H. HOWLAND.

(Here follows one 70-cent and one 30-cent Treasury stamp.)

The board of commissioners of the Atlantic and Pacific Railroad Company.

The foregoing bond of James P. Robinson and others, being such as the said board of commissioners deem proper, is hereby approved by them, and such approval is verified by the signatures of their president and secretary.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

SAINT LOUIS, *October 5th*, 1866.

Pursuant to the instructions of the board of commissioners, in a resolution passed at their meeting in Turner hall, October 1st, 1866, the president and secretary opened the books for subscription to the capital stock of the Atlantic and Pacific Railroad Company, at parlor No. six in the Southern hotel, in the city of Saint Louis, October 2d, A. D. 1866, at 10 o'clock a. m. Said books remained open until Friday, October 5th, A. D. 1866, when the amount necessary by law having been subscribed and the sum of ten dollars per share paid over to the treasurer the books were then closed.

The following is a correct copy of the subscription book and the subscription thereto.

Atlantic and Pacific Railroad Company.

Subscriptions to the Capital Stock.

28 We, the undersigned, hereby subscribe to the capital stock of the Atlantic and Pacific Railroad Company, a corporation created by act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, in such sums and number of shares as appear opposite our names respectively, hereby binding ourselves, our administrators, executors and assigns, to the payment of such subscriptions, in such installments as the said act requires, and as the board of commissioners, created by said act, or the board of trustees, or directors to succeed such commissioners may from time to time require, in pursuance of a resolution passed at a meeting of the board of

commissioners held the first day of October, 1866, authorizing books for subscription to be opened this day.

St. Louis, Oct. 2d, 1866.

Oct. 4th, J. C. Fremont, New York, fifteen hundred shares.

Oct. 4th, J. C. Fremont (trustee), New York, seven hundred and fifty shares.

Oct 4th, J. C. Fremont (trustee), New York, five hundred shares.

Oct. 4th, Frederick Billings, California, one thousand shares.

Oct. 4th, Levi Parsons, New York, one thousand shares.

Oct. 4th, Geo. Yost, Fort Plain, New York, per Levi Parsons, four hundred shares.

Oct. 4th, Edward Parsons, Chicago, per Levi Parsons, two hundred shares.

Oct. 4th, Ward & Co., New York, per F. B., two hundred shares.

Oct. 4th, Leonidas Haskell, New York, four hundred shares.

Oct. 4th, J. P. Robinson, New York, five hundred shares.

Oct. 4th, J. P. Robinson, attorney for J. Caldwell, Boston, four hundred shares.

Oct. 4th, J. P. Robinson, attorney for F. L. A. Poiche, San Francisco, two hundred shares.

Oct. 4th, J. P. Robinson, attorney for L. L. Robinson, San Francisco, two hundred shares.

29 Oct. 4th, Bonvier & Howland, St. Louis, one hundred shares.

Oct. 4th, O. P. C. Billings, New York, two hundred shares.

Oct. 4th, Sam. P. Dinsmore, New York, one hundred shares.

Oct. 4th, Ed. Gilbert, 71 Broadway, New York, one hundred shares.

Oct. 4th, James Tassig, St. Louis, Mo., two hundred and fifty shares.

Oct. 4th, Emil Preetorious, St. Louis, Mo., two hundred and fifty shares.

Oct. 4th, B. B. Chapman, Elyna, O., one hundred shares.

Oct. 5th, D. R. Garrison, St. Louis, Mo., sixteen hundred shares.

The above subscription having been completed and the books closed in pursuance of the farther requirements of the act of incorporation, the president and secretary issued the following notice, which was published in the St. Louis Democrat and the Saint Louis Republican the proper period of time:

Atlantic and Pacific Railroad Company.

A meeting of the subscribers to the capital stock of the Atlantic and Pacific Railroad Company will be held at the office of the Southwest Pacific Railroad Company, (No. 15 Nassau street) New York city, for the purpose of organization and election of thirteen directors, according to the requirements of the charter of said company, on Wednesday, October 31st, 1866, at 12 o'clock, noon.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

NEW YORK CITY, *Oct.* 31*st*, 1866.

Pursuant to a notice published as required by law the subscribers to the capital stock of the Atlantic and Pacific Railroad Company assembled at the office of the Southwest Pacific Railroad
30 Company, No. 15 Nassau street, New York city, on Oct. 31st, at 12 o'clock, noon, for the purpose of electing thirteen directors.

John C. Fremont, president, and Charles H. Howland, secretary, the officers designated by law to act as inspectors of said election, were present and performed said duty.

The following persons were then elected directors of the company: J. C. Fremont, Levi Parsons, Frederick Billings, James P. Robinson, Chas. H. Howland, Samuel P. Dinsmore, Daniel R. Garrison, George Yost, Leonidas Haskell, Josiah Caldwell, Chas. H. Ward, O. P. C. Billings, L. L. Robinson.

On motion of Levi Parsons, it was

Resolved, That the directors of the Atlantic and Pacific Railroad Company be requested to purchase the Southwest Pacific Railroad of Missouri, upon the best terms and to the best advantage possible.

On motion of Levi Parsons, it was

Resolved, That the board of directors be empowered and authorized to create such offices, and to appoint or elect such officers, agents or servants as they may deem necessary and proper for administration and prosecution of the affairs of the company.

On motion of Levi Parsons, it was

Resolved, That the board of directors be requested to prepare for publication as soon as convenient, a report of the route with its advantages, and the affairs of the company.

On motion the meeting then adjourned *sine die*.

The following is a copy of the certificates of the inspectors of election:

NEW YORK, *Nov.* 13*th*, 1866.

This is to certify that in accordance with the requirements of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, we, John C. Fremont, president, and Charles H. Howland,
31 secretary of the board of commissioners appointed under said act, have as the legally constituted inspectors of the election for thirteen directors to be chosen by the subscribers of the capital stock to the Atlantic and Pacific Railroad Company, at a meeting convened on the 31st of October, 1866, attended to said duty, and do hereby declare that the following persons, subscribers to the capital stock of said company and entitled to vote at said election, have received a majority of the legal votes cast at said election: J. C. Fremont, Levi Parsons, Frederick Billings, Jas. P. Robinson, Charles H. Howland, Samuel P. Dinsmore, Daniel R. Garrison, George Yost, Leonidas Haskell, Josiah Caldwell, Charles H. Ward, O. P. C. Billings, L. L. Robinson; and we hereby declare the aforementioned

persons to be legally elected directors of said Atlantic and Pacific Railroad Company.

(Signed) J. C. FREMONT, *President.*
(Signed) CHAS. H. HOWLAND, *Secretary.*

The following is a copy of the notices served upon the persons elected, informing them of their election:

NEW YORK, *Nov. 12th*, 1866.

SIR: At a meeting of the subscribers to the capital stock of the Atlantic and Pacific Railroad Company, convened on the 31st day of October, 1866 (in pursuance to notice published according to law,) at the office of the Southwest Pacific Railroad Company, No. 15 Nassau street, New York city, you were elected a director of said company, having received a majority of the legal votes cast.

(Signed) J. C. FREMONT, *President,*
CHAS. H. HOWLAND,
Secretary, Inspectors of Election.

Also a copy of the notice served upon the directors-elect to meet for organization:

NEW YORK, *Nov. 13th*, 1866.

SIR: You are hereby notified that there will be a meeting
32 of the directors of the Atlantic and Pacific Railroad Company for the purpose of organization and such other business as may be presented, on Tuesday, Nov. 20th, 1866, at 12 o'clock, noon, at the office of the Southwest Pacific Railroad Company, No. 54 William street, New York city.

You will please acknowledge receipt on the face of this notice and return it.

Yours truly,
(Signed by) J. C. FREMONT.
CHAS. H. HOWLAND.
JOSIAH CALDWELL.
LEONIDAS HASKELL.
SAMUEL P. DINSMORE.
O. P. C. BILLINGS.
LEVI PARSONS.
JAMES P. ROBINSON.
FRED'K BILLINGS.
C. H. WARD.

NEW YORK CITY, *Nov. 20th*, 1866.

At a meeting of the board of directors of the Atlantic and Pacific Railroad Company, held pursuant to the foregoing call of a majority of the members of the board-elect, the undersigned, president and secretary of the board of commissioners of the Atlantic and Pacific Railroad Company, formally delivered into the possession of the

said board of directors duly organized, the books, papers, etc., of the board of commissioners.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND,
Secretary of Board of Commissioners of
Atlantic and Pacific Railroad Company.

The following is a copy of the minutes of the board of directors of the Atlantic and Pacific Railroad Company (at their meeting held on Nov. 22d, 1866), relating to delivery of books, papers, property, etc.:

On motion of Samuel P. Dinsmore, it was

Ordered, that this board hereby acknowledge the delivery over to them by the board of commissioners of the Atlantic and Pacific Railroad Company, their treasurer, and secretary, of all the
33 monies, properties, subscription books and other books heretofore in their possession as such commissioners, treasurer, and secretary, and the secretary of this company be directed to cancel the bond given by the treasurer aforesaid to said board of commissioners and preserve the same cancelled on the files of this company.

We certify that the above is a true copy of the order of the board of directors.

(Signed) LEVI PARSONS,
Vice-President of the Board of Directors of A. & P. R. R. Co.

(Signed) CHAS. H. HOWLAND, *Secretary.*

NEW YORK CITY, *Dec. 5th*, 1866.

We, John C. Fremont, president, and Charles H. Howland, secretary, of the board of commissioners of *of* the Atlantic and Pacific Railroad Company, elected by said board at their meeting held at Turner hall, in the city of Saint Louis, Mo., Oct. 1st, 1866, hereby certify that the foregoing is a correct copy of the minutes of said board of commissioners, and all proceedings in detail had in compliance with the act of Congress, entitled "An act granting lands to aid in the construction of a railroad from the States of Missouri and Arkansas to the Pacific ocean." Approved July 27th, 1866.

J. C. FREMONT, *President.*

CHAS. H. HOWLAND,
Secretary of Board of Commissioners of
Atlantic and Pacific Railroad Company.

Mr. SPRINGER: I offer in evidence, a similar exemplified copy, showing proceedings of directors, November 20, 1866, which is marked Exhibit No. 3, and is as follows:

EXHIBIT No. 3.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby
34 certify that the annexed paper is a true copy of the original letter, with its endorsement, and of its enclosure, on file in this department.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

Office of the Atlantic and Pacific Railroad Co., 54 William street.

NEW YORK, *Dec. 6th*, 1866.

Hon. O. H. Browning, Secretary of the Interior, Washington, D. C.

SIR: In accordance with the instructions of the board of directors of the Atlantic and Pacific Railroad Company, we herewith forward to you a copy of the proceedings of the board of directors of said company verified, under seal of said company, setting forth their action under section 14 of the act incorporating said company, also the proceedings in reference to section 12 of said act, accepting the terms, conditions and impositions of said act by the company.

Respectfully yours, J. C. FREMONT, *President.*

CHAS. H. HOWLAND,
Secretary of Atlantic and Pacific Railroad Co.

(Indorsement:) New York, Dec. 6th, 1866. J. C. Fremont, president, forwards copy of proceedings to the board of directors of the Atlantic and Pacific R. R., setting forth the organization of the company. Ack. Dec. 14th, 1866.

B.

Copy of the Records of the Board of Directors of the Atlantic and Pacific Railroad Company.

Copy of the proceedings of the board of directors of the Atlantic and Pacific Railroad Company setting forth the organization of the company.

35 NEW YORK CITY, *Nov. 20th*, 1866.

Pursuant to a call of a majority of the newly elected board of directors of the Atlantic and Pacific Railroad Company, the board met for the purpose of organization at the office of the Southwest Pacific Railroad Company, at No. 54 William street, New York city, at twelve o'clock, noon, on Tuesday, Nov. 20th, 1866.

Present: Levi Parsons, John C. Fremont, Jas. P. Robinson, Chas. H. Ward, Leonidas Haskell, O. P. C. Billings, S. P. Dinsmore, Chas. H. Howland, Josiah Caldwell.

Gen. John C. Fremont was called to the chair and Chas. H. Howland appointed secretary of the meeting.

The notice calling the meeting was then read, also the certificate of the inspectors of election, at which the board was elected, and were ordered spread on the minutes.

John C. Fremont, president, and Chas. H. Howland, secretary of the board of commissioners, then formally delivered to the board of directors the books, papers, &c., of the board of commissioners.

On motion of James P. Robinson, it was

Ordered that the officers of this company shall be a president, assistant president, first vice-president (resident in Missouri), second vice-president (resident in California), secretary and treasurer, and such other officers as may be provided by the by-laws of the company to be hereinafter adopted.

On motion of L. Haskell, it was

Resolved, That the board now proceed to the election of officers, the vote to be *viva voce*.

Whereupon John C. Fremont was unanimously elected president; Levi Parsons was unanimously elected assistant president; Daniel K. Garrison was unanimously elected first vice-president (resident in Missouri); Lester L. Robinson was unanimously elected second vice-president (resident in California); James P. Robinson
36 was unanimously elected treasurer; Chas. H. Howland was unanimously elected secretary.

On motion of Levi Parsons, it was

Ordered, that the secretary be authorized and directed to procure the necessary books and papers for the use of the company, including certificates of stock.

On motion of Levi Parsons, it was

Ordered, that the following model of a seal be adopted for the purpose of authenticating to the United States Government the acceptance by the company of the terms, conditions, and impositions of the act incorporating the company, and for other purposes where the use of the company's corporate seal is required, until such time as a seal with more complete devices shall be adopted by the company.

(Space for seal.)

On motion of S. P. Dinsmore, it was

Ordered, that the acceptance by the Atlantic and Pacific Railroad Company of the terms, conditions, and impositions of the act passed by Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, be signified in writing under the corporate seal of the company, and that the president and secretary authenticate such acceptance and signification, and cause the same to be deposited in the office of the

Secretary of the Interior, and that for all purposes the provisions of said act be deemed and taken to be accepted by the company.

On motion of James P. Robinson, it was

Ordered, that the location of the line of road of this company between Springfield, Missouri, and the west line of said State, as indicated on map now submitted, be and the same is hereby adopted; and that the president and secretary be directed to authenticate such to the Secretary of the Interior, and that a copy of such authentication and map be filed with the Secretary of the Interior.

On motion of Levi Parsons, it was

37 Ordered, that Messrs. O. P. C. Billings, Jas. P. Robinson, and Howland be appointed a committee to draft a set of by-laws to be reported to the board.

On motion the board then adjourned to meet at same place on Wednesday, Nov. 21st, 1866, at twelve o'clock, noon.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

In compliance with the requirements of the act of incorporation (see sec. 14), the secretary subscribed to and was sworn to the following oath before entering upon the duties of his office.

(Copy.)

STATE OF NEW YORK, }
City and County of New York. }

On the twentieth day of November, in the year one thousand eight hundred and sixty-six, before me personally came Chas. H. Howland, personally known, and made oath that having been elected secretary of the Atlantic and Pacific Railroad Company he would faithfully discharge his duties in such office, according to the best of his ability.

(Signed) CHAS. H. HOWLAND, *Secretary.*

Sworn to before me this 20th day of Nov., 1866.

(Signed) ROB'T CORLETT,
[NOTARIAL SEAL.] *Notary Public, City of New York.*

[5c. rev. stamp.]

NEW YORK CITY, *Nov. 22d*, 1866.

The board met pursuant to adjournment.

Present: John C. Fremont, Daniel R. Garrison, Leonidas Haskell, James P. Robinson, Chas. H. Howland, Samuel P. Dinsmore, Levi Parsons, Josiah Caldwell.

Minutes of last meeting read and approved.

The president laid before the board a letter from Hon. O. H. Browning, Secretary of the Interior, relating to the reserva-

38 tion of lands along the route of the Atlantic and Pacific railroad. Said letter was read and ordered to be filed.

On motion of Samuel P. Dinsmore, it was

Ordered, that this board hereby acknowledge the delivery over to them by the board of commissioners of the Atlantic and Pacific Railroad Company, their treasurer, and secretary, of all the monies, properties, subscription books and other books heretofore in their possession as such commissioners, treasurer, and secretary; and the secretary of this board be directed to cancel the bond given by the treasurer aforesaid, to said board of commissioners, and preserve the same cancelled on the files of this company.

On motion the board adjourned to meet on Friday, Nov. 23d, 1866, at twelve o'clock, noon.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

Office of the Atlantic and Pacific Railroad Co., 54 William street.

NEW YORK, *Dec. 6th*, 1866.

The undersigned, president and secretary of the Atlantic and Pacific Railroad Company, certify that the foregoing is a true copy from the records of the board of directors of the said Atlantic and Pacific Railroad Company, and in testimony thereof we hereby affix our hands and the seal of the company hereto.

J. C. FREMONT,
[COMPANY SEAL.] *President A. & P. R. R. Co.*
CHAS. H. HOWLAND, *Secretary.*

Mr. SPRINGER: I offer in evidence a similar exemplified copy, showing acceptance by the company of the terms of the act of Congress, marked Exhibit No. 4, and which is as follows:

39 EXHIBIT No. 4.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, with its endorsement, and of its enclosure, on file in this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.
[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

Office of the Atlantic and Pacific Railroad Co., 54 William St.

NEW YORK, *Nov. 23d*, 1866.

Hon. O. H. Browning, Secretary of the Interior, Washington city, D. C.

SIR: In compliance with the requirements of section 12 of an act of Congress entitled "An act granting lands to aid in the construc-

tion of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, we have the honor of transmitting to you herewith the resolution of the board of directors of the Atlantic and Pacific Railroad Company accepting "the terms, conditions and impositions" of said act. We have the honor to be, respectfully your obedient servant,

J. C. FREMONT,
President A. & P. R. R. Co.

CHAS. H. HOWLAND,
Secretary A. & P. R. R. Co.

[A. & P. R. R Co. Seal.]

NEW YORK CITY, *Nov. 22d*, 1866.

At a meeting of the board of directors of the Atlantic and
40 Pacific Railroad Company, held this day, it was

Ordered, that the acceptance by the Atlantic and Pacific Railroad Company of the terms, conditions and impositions of the act passed by Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, be signified in writing under the corporate seal of the company, and that the president and secretary authenticate such acceptance and signification, and cause the same to be deposited in the office of the Secretary of the Interior, and that for all purposes the provisions of said act be deemed and taken to be accepted by the company.

(Indorsement:) New York, Nov. 23d, 1866. J. C. Fremont, pres't, etc., enclosed acceptance by the Atlantic and Pacific Railroad Company of the act of Congress, approved July 27th, 1866. See letter to Mr. Fremont, dated Nov. 27th, 1866.

Mr. SPRINGER: I offer in evidence a list of maps filed by the company, and memoranda of withdrawals of land in the grant, etc., which is marked Exhibit No. 5 A, and is as follows:

EXHIBIT No. 5 A.

Date of Laws.

July 27, 1866, Stat. 14, p. 292; 20 and 30 mile limits; 40 and 50 mile limits.

April 20, 1871, 17 Stat., p. 19, Pamphlet Laws. Act authorizing the company to mortgage its road.

For decision in matter of company's claim to a grant in California, see Secretary to this office, April 15, 1874, with opinion of Attorney General, of 16 M'ch, 1874.

Maps Filed by the Company.

All maps are in tube 13.

Map designating the line of route from Springfield, Mo., to the western boundary of the State. Adopted by the board of
41 directors of the company November 20th, 1866. Received at the General Land Office, December 17th, 1866, with letter

from the Secretary of the Interior, dated December 15th, 1866, for appropriate action. Right of road attaches from December 17th, 1866. January 30th, 1867, to Secretary of the Interior recommending withdrawal. February 2d, 1867, Secretary (G. 95609) approves above recommendation. February 14, 1867, withdrawal 20 and 30 miles ordered, Missouri. April 30, 1867, withdrawal 20 and 30 miles ordered, Arkansas. (For map filed in 1867, see page 13.)

Map of definite location from Springfield to Neosho, Mo. (giving dates of field-work). Sworn and subscribed by the chief engineer June 20th, 1870. Adopted by resolution of the board of directors passed July 7th, 1870. Certified by the officers of the company July 8th, 1870. Received at the General Land Office with letter from the Secretary of the Interior, dated December 10th, 1870. Right of road attaches from date of filing map designating route. Map of designated route from Neosho, Mo., to Prairie Summit, in Indian Territory. (See Attorney General's opinion, October 26, 1880, 16 Op'ns Attorney General, p. 372.)

Certified by the president of the company November 29, 1870. Received at the department November 30, 1880, from Francis Hayes, Esq., president. Accepted by the department, and Indian Office so advised March 15, 1871. Received at the General Land Office September, 1871, with tubes.

Map of definite location from the Missouri State line to the mouth of King Fisher creek in Indian Territory (giving dates of field-work). Affirmed and subscribed by the chief engineer November 25, 1871. Adopted by resolution of the board of directors, and certified by the officers of the company November 25, 1871. Received at the General Land Office December 2, 1871, with letter from the Secretary of the Interior, dated December 1, 1871. Right of road attaches from December 2, 1871. (See letter from the Commissioner of the General Land Office to Secretary of the Interior, October 13, 1877, in the matter of a grant in Indian Territory. Senate Ex. Doc. 124, 46 Cong., 2 sess.)

42 Duplicate maps of branch line, as definitely located, (giving dates of field-work,) from Van Buren, near the western boundary of Arkansas, to a point, in the valley of the Canadian river, near the meridian of 96° west longitude, Indian Territory. Affirmed and subscribed by the chief engineer November 25, 1871. Adopted by resolution of the board of directors and certified by the officers of the company November 25, 1871. Received at the General Land Office December 2, 1871, and February 7, 1872, with letters from the Secretary of the Interior, dated December 1, 1871, and February 6, 1872. Right of road attaches from February 7, 1872. (See Secretary's letter of April 20, 1872, approving above map—May 3, 1872, to Dardanelle and Harrison, withdrawing lands—20 and 30 miles—in Arkansas. Acknowledged May 22d and 25th respectively.)

Map of definite location of branch line (giving dates of field-work), from a point on the Canadian river near the 96° west longitude, to an intersection with the main line in the valley of the Canadian river. Adopted by resolution of the board of directors

passed January 17, 1872. Certified by the officers of the company February 1, 1872. Affirmed and subscribed by the chief engineer the same date. Received at the General Land Office February 7, 1872, with letter from the Secretary of the Interior, dated February 6, 1872. Right of road attaches from February 7, 1872.

Map of definite location of the main line (giving dates of field-work), from the mouth of King Fisher creek, Indian Territory, to the eastern boundary of New Mexico. Affirmed and subscribed by the chief engineer January 12, 1872. Adopted by resolution of the board of directors passed January 17, 1872. Certified by the officers of the company January 18, 1872. Received at the General Land Office February 7, 1872, with letter from the Secretary of the Interior, dated February 6, 1872. Right of road attaches from February 7, 1872.

Map of definite location (giving dates of field-work) through the Territory of New Mexico. Affirmed and subscribed by the chief engineer February 21, 1872. Adopted by resolution of the board of directors and certified by the officers of the company February 27, 1872. Received at the General Land Office March 12, 1872, with letter from the Secretary of the Interior, dated March 9, 1872. Lands withdrawn by letter of May 8, 1872. Right of road attaches from March 12, 1872. Withdrawal 40 and 50 mile limits ordered May 8, 1872. Received at Santa Fé May 18, 1872.

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Map of definite location (giving dates of field-work) through the Territory of Arizona. Affirmed and subscribed by the chief engineer February 21, 1872. Adopted by resolution of the board of directors and certified by the officers of the company February 27, 1872. Received at the General Land Office March 12, 1872, with letter from the Secretary of the Interior, dated March 9, 1872. Lands withdrawn by letter of May 17, 1872. Right of road attaches from March 12, 1872. Withdrawal 40 and 50 mile limits ordered May 17, 1872. Received at Prescott June 18, 1872.

Map of definite location (giving date of field-work) from San Francisco to San Miguel, Cal., in township 25 S., range 12 E., Mount Diablo meridian. Affirmed and subscribed by the chief engineer February 1, 1872. Adopted by resolution of the board of directors, and certified by the officers of the company February 1, 1872. Received at the General Land Office March 12, 1872, with letter from the Secretary of the Interior dated March 9, 1872. Lands withdrawn by letters of April 22, 1872. Right of road attaches from March 12, 1872. Withdrawal 20 and 30 mile limits ordered April 22, 1872. Received at San Francisco May 2, 1872; at Los Angeles May 7, 1872, and at Visalia May 9, 1872.

Map of definite location (giving dates of field-work) through the county of Los Angeles and part of San Bernardino, Cal., or from a point on the western boundary of Los Angeles county to a point in township 7 N., R. 7 E., San Bernardino base and meridian. Affirmed and subscribed by the chief engineer February 1, 1872. Adopted by resolution of the board of directors and certified by the officers of the company February 1, 1872. Received at the General Land Office March 12, 1872, with letter from the Secretary of the

Interior, dated March 9, 1872. Lands withdrawn by letter of April 22, 1872. Right of road attaches from March 12, 1872. (For withdrawal see map last above described.)

44 Two maps of definite location (giving dates of field-work). One from San Miguel mission, Cal., in T. 25 S., R. 12 E., M. D. M., to the Los Angeles county line, and the other from a point in T. 7 N., R. 7 E., S. B. M., San Bernardino county, to the Colorado river. Affirmed and subscribed by the chief engineer June 15 and July 19, 1872. Adopted by resolution of the board of directors, and certified by the officers of the company August 6, 1872. Filed in the office of the Secretary of the Interior August 15, 1872. Received at the General Land Office with Secretary's letter, April 16, 1874 (K. 97654). Right of road attaches from August, 1872. Letters of withdrawal November 23, 1874, received at district offices—at San Francisco, December 9, 1874; at Visalia, December 10, 1874, and at Los Angeles, December 10, 1874.

Map and profile of construction of 6th section, or sections one and two, 50 miles from a point in T. 8 N., R. 2 E., near Isleta, New Mexico, and thence westwardly. Filed in this office December 18, 1880, with letter of Secretary of the Interior of December 17, 1880 (79285). (Profile filed in drawer of case containing tubes.)

Map and profile of construction of third and fourth sections of twenty-five miles each, beginning at a point 50 miles west of the junction of said road with the New Mexico and Southern Pacific railroad, near Isleta, N. M., and ending at 100-mile post, west of said junction. Filed in this office April 20, 1881, with letter of Secretary of the Interior, dated April 19, 1881 (26571). Report of commissioners, &c., approved by the President April 18, 1881. (Profile filed in drawer of case containing tubes. Map in middle drawer, room 61.)

Four maps (and profiles) of construction of 5th, 6th, 7th and 8th sections of 25 miles each, of the Western division of the Atlantic and Pacific railroad, beginning at a point 100 miles west of Isleta, New Mexico, and ending at a point in Arizona. Filed in this office January 9, 1882, with letter of Secretary of the Interior of January 7, 1882 (1979). Report of commissioners approved by the President January 5, 1882. (Profile filed in drawer of case containing tubes.)

45 Two maps of 6th and 7th sections of 25 miles each, of the Central division of road in Indian Territory, beginning at a point 1.54 miles west of the crossing of Missouri, Kansas and Texas railway, and ending at a point 50 miles west of place of beginning.

And eight maps of said road for sections 9 to 16 inclusive, twenty-five miles each, in Territory of Arizona, Western division, beginning at a point 200 miles west of the junction of this railroad with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and ending at a point 200 miles westward of the place of beginning. Filed in this office December 19, 1882, with letter of Secretary of the Interior dated 16 December, 1882 (96720). Report of commissioners approved by the President December 14, 1882. (Ten

profile maps filed; they are placed in drawer of case containing tubes. Maps in middle drawer of room 61.)

Six maps (17th to 22d sections) of constructed road, commencing at a point 400 miles west from Isleta, New Mexico, thence westward to a point 150 miles from place of beginning. Filed in this office Nov. 5th, 1883, with letter of Secretary of the Interior, dated Nov. 3d, 1883 (103,289). (Six profile maps filed, which are placed on Mr. Benton's desk, in middle drawer.)

Map of amended definite location branch line in Indian Territory, received in this office with letter from J. A. Williamson, Esq., general solicitor of the company, dated Nov. 9th, 1883 (106,005), submitted to Secretary with letter of Nov. 20, 1883, and returned with Secretary's letter of Nov. 28th, 1883 (111,929). Accepted so far as *as* it — amendatory of the original route of said line, which ran north of the Canadian river and through the Creek and Cherokee country. (In middle drawer.)

Section Maps of Constructed Road.

Sec's.	Mile-posts.	Miles in sec.	Approved by pres't.
1.....	1 to 25.....	25	October 4, 1870.
2.	25 to 50.....	25	October 4, 1870.
3....	50 to 75... ..	25	January 31, 1871.
4.....	75 to 100.....	25	December 6, 1871.
5.....	100 to 125.....	25	December 6, 1871.
46	West of Rio Grande in New Mexico division.		
1, 2.....	....	50	December 17, 1880.
3, 4.....	50 to 100.....	50	April 18, 1881.
5, 6, 7.....	100 to 175.....	75	
8.....	175 to 200.....	25	January 5, 1882.
	Eastern division, Indian Territory.		
6.....	125 to 150.....	25	December 14, 1882.
7.....	150 to 175... ..	25	December 14, 1882.
	Western division, Arizona.		
9.....	200 to 225.....	25	December 14, 1882.
10.....	225 to 250	25	December 14, 1882.
11.....	250 to 275.....	25	December 14, 1882.
12.....	275 to 300.....	25	December 14, 1882.
13...	300 to 325.....	25	December 14, 1882.
14.....	325 to 350.....	25	December 14, 1882.
15...	350 to 375.....	25	December 14, 1882.
16.....	375 to 400.....	25	December 14, 1882.

Arizona.

Sec's.	Mile-posts.	Miles in sec.	Approved by pres't.
17.....	401 to 425.....	25	October 30, 1883.
18.....	426 to 450.....	25	October 30, 1883.
19.....	451 to 475.....	25	October 30, 1883.
20.....	476 to 500	25	October 30, 1883.
21.....	501 to 525.....	25	October 30, 1883.
22.....	526 to 550.....	25	October 30, 1883.

By letter dated October 25, 1869, Francis B. Hayes, president of company, filed in this office a map (received October 26, 1869) designating the line of the company's road from the Colorado river to San Francisco, and asked that the proper reservation be made. See the decision of the Secretary of the Interior November 11, 1869, holding that the act of July 27, 1866, did not make grant to the A. & P. from the Colorado river to San Francisco. Map filed with the company's papers. H. 79936. See Ex. Doc. No. 9, 41st Congress, 2d session, House of Representatives.

Mr. SPRINGER: I offer in evidence certified copies, from the files of the Interior Department, of the plats of general route and of definite location of the line of the road, under sections 3 and
47 6 of the act, covering the entire line, and acceptance of the same by the United States, marked Exhibits No. 5, 5*a*, 5*b*, 5*c*., etc.

EXHIBIT No. 5, 5*a*, ETC.

By agreement of counsel the original maps are to be transmitted to the Supreme Court.

Mr. SPRINGER: I offer in evidence executive orders withdrawing lands within the limits of the grant to the Atlantic and Pacific Railroad Company from entry and sale (marked Exhibits Nos. 6, 6*a*, 6*b*, 6*c*, 6*d*), calling special attention to No. 6*b*, showing the withdrawal of all the odd-numbered sections within the 40 and 50 mile limits of the grant through the Territory of New Mexico. Said exhibits are as follows:

EXHIBIT No. 6.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter, dated Feb. 14th, 1867, and addressed to the district officers at Springfield, Missouri, is a true and literal exemplification of the original letter as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOMAS H. CARTER,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb. 14th*, 1867.

Register and receiver, Springfield land office, Mo.

GENTLEMEN: The Atlantic and Pacific Railroad Company, under the act of Congress approved 27th of July, 1866, Statutes for 48 1866, page 292, have filed an authenticated map of survey and location of their road from Springfield to the western boundary of the State.

Enclosed is a diagram showing by red line the 20-mile limits of the grant in place so far as the same falls to said road in your district, with 10 additional mile limits indemnity as indicated by purple line to make up the indemnity.

You are hereby directed to withhold from sale or other disposal, all the odd-numbered sections within the said 20-mile limits, and within the additional 10-mile indemnity limits.

The register will proceed at once to lay down distinctly in pencil on the township plat the limits of the line of route, with the 20-mile limits in place, and the 10-mile indemnity limits, then make the proper notes showing the odd sections to be reserved.

The vacant undisposed of odd-numbered sections within the 20-mile limits of said road, as indicated in the diagram, inure in place to the company, except wherein there exists pre-emption having prior inception.

In virtue of the act of Congress approved March 27th, 1854, U. S. Statutes, vol. 10, p. 269, the even sections within the granted limits are subject to pre-emption at $2.50 per acre and must be dealt with accordingly, and in like manner under the homestead law, which reduces the quantity to 80 acres.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully your obedient servant,

JAS. S. WILSON,
Commissioner.

EXHIBIT No. 6*a*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copies of office letters, dated

May 3d, 1872, and addressed to the local officers at Dardanelle
49 and Harrison, Arkansas, are true and literal exemplification of the original letters as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOMAS H. CARTER,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 3d*, 1872.

Register and receiver, Dardanelle, Arkansas.

GENTLEMEN: I transmit herewith diagram showing the twenty and thirty mile limits of branch line of Atlantic and Pacific railroad to Van Buren, and falling within your district, and by direction of the Secretary of the Interior you are directed to withdraw from disposal the odd-numbered sections and parts of sections, colored blue, and outside of former withdrawn limits of Little Rock and Fort Smith railroad.

You will increase in price to $2.50 per acre the even-numbered sections and parts of sections falling between the six-mile limits of the Little Rock and Fort Smith railroad and the twenty-mile limits of the Atlantic and Pacific railroad, and dispose of them at that ratability and under the homestead law only.

This order will take effect from 7th of February, 1872, the date when the map of definitely located branch line was filed in the General Land Office.

Please note the withdrawal in your records, and acknowledge receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 3d*, 1872.

Register and receiver, Harrison, Arkansas.

GENTLEMEN: I transmit herewith diagram showing the twenty and thirty mile limits of branch line of Atlantic and Pacific railroad to Van Buren, and falling within your district, and by
50 the direction of the Secretary of the Interior you are directed to withdraw from disposal the odd-numbered sections and parts of sections colored blue, and outside of former withdrawn limits of Little Rock and Fort Smith railroad.

You will also increase in price to $2.50 per acre the even-numbered sections and parts of sections falling between the limits of six miles of Little Rock and Fort Smith railroad and the twenty-mile limits of Atlantic and Pacific railroad, and dispose of them at that ratability, and under the homestead law only.

This order will take effect from 7th of February, 1872, the date when the map of definitely located branch line was filed in the General Land Office.

Please note the withdrawal in your records and acknowledge receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

EXHIBIT No. 6*b*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter of May 8th, 1872, addressed to the local officers at Santa Fé, New Mexico, is a true and literal exemplification of the original letter as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOMAS H. CARTER,
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 8th*, 1872.

Register and receiver, Santa Fé, N. M.:

I transmit herewith a diagram showing the location of the
51 Atlantic and Pacific railroad, through the Territory of New Mexico from the eastern to the western boundaries, showing also the forty and fifty mile limits of the land grant thereto, under act of July 27th, 1866, and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road was designated by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the forty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that ratability, and only under the pre emption and homestead laws. The even sections outside of the forty-mile limits are not affected by this withdrawal, nor are claims of pre-emption settlers initiated prior to the right of the road attaching, March 12th, 1872, affected by it.

You will please acknowledge the receipt of this letter without delay.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

EXHIBIT No. 6*c*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copies of office letters, dated May 17th, 1872, and addressed to the local officers at Prescott, Arizona Territory, is a true and literal exemplification of the original letter as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOMAS H. CARTER,
Commissioner of General Land Office.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 17th*, 1872.

Register and receiver, Prescott, Arizona T'y.

GENTLEMEN: I transmit herewith a diagram showing the location of the Atlantic and Pacific railroad through the Territory of Arizona, from the eastern to the western boundaries, showing also the forty and fifty mile limits of the land grant thereto, under act of Congress approved July 27th, 1866; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, not reserved, sold, granted, or otherwise appropriated, and free from pre-em-tion or other claims or rights, at the time the line of said road was designated by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the forty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that price, and under the pre-emption and homestead laws only. The even sections outside of the forty-mile limits are not affected by this withdrawal, nor are the claims of pre-emption settlers initiated prior to the right of the road attaching, March 12th, 1872, affected by it.

You will please acknowledge the receipt of this letter without delay.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

EXHIBIT No. 6*d*.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copies of office letters addressed as follows:

1. Register and receiver, Los Angeles, Cal., April 22d, 1872.
2. Register and receiver, Los Angeles, Cal., Nov. 23d, 1874.
53 3. Register and receiver, San Francisco, Cal., April 22d, 1872.
4. Register and receiver, San Francisco, Cal., Nov. 23d, 1874.
5. Register and receiver, Visalia, Cal., April 22d, 1872.
6. Register and receiver, Visalia, Cal., Nov. 23d, 1874.

Are true and literal exemplifications of the original letters as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOMAS H. CARTER,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 22d*, 1872.

Register and receiver, Los Angeles, Cal.

GENTLEMEN: I transmit herewith a diagram showing the definite location of the Atlantic and Pacific railroad, under act of July 27th, 1866, Stat., vol. 14, p. 292, from a point on the western boundary of Los Angeles county to a point in T. 7 N., R. 7 E., of the San Bernardino, in your district, showing also the twenty and thirty mile limits of the land grant under said act; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections falling within those limits, both surveyed and unsurveyed, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road was designated by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the twenty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that ratability, and only under the pre-emption and homestead laws. The even sections outside of the twenty-mile limits are not affected by this withdrawal. Claims initiated by settlers under the
54 pre-emption laws prior to the right of the road attaching, March 12th, 1872, are not affected by this order.

Be pleased to acknowledge the receipt of this letter without delay.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 23d*, 1874.

Register and receiver, Los Angeles, Cal.

GENTLEMEN: I transmit herewith two diagrams, which show the completed limits of the grant to the Atlantic and Pacific Railroad Company in your district, prepared from the maps of definite location of the road, filed in the department August 15th, 1872, and

although only recently accepted, the rights of the company must attach to the lands from that date.

You will accordingly withhold from sale or entry all the odd-numbered sections within the thirty-mile limits shown on the diagrams, and hold the even sections within the twenty-mile limits at $2.50 per acre. The even sections between the twenty and thirty mile limits are not affected by the grant.

Be pleased to promptly acknowledge the receipt of this letter and diagrams.

Very respectfully, S. S. BURDETT,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 22d*, 1872.

Register and receiver, San Francisco, Cal.

GENTLEMEN: I transmit herewith diagram showing the definite location of the Atlantic and Pacific railroad, under act of July 27th, 1866, Stat., vol. 14, p. 292, from San Francisco to San Miguel mission, California, showing also the twenty and thirty mile limits of the land grant, under said act; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections falling within those limits, both surveyed and unsurveyed, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or
55 rights, at the time the line of said road was designated, by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the twenty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that ratability, and only under the pre-emption and homestead laws. The even sections outside of the twenty-mile limits are not affected by this withdrawal. Claims initiated by settlers under the pre-emption laws prior to the right of the road attaching, March 12th, 1872, are *are* not affected by this order.

Be pleased to acknowledge the receipt of this letter without delay.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 23d*, 1874.

Register and receiver, San Francisco, Cal.

GENTLEMEN: I transmit herewith diagram showing the completed limits of the grant to the Atlantic and Pacific Railroad Company, in your district, prepared from the map of definite location, filed in the department August 15th, 1872, by the company, and although only recently accepted their rights must attach to the lands from that date.

You will accordingly withhold from sale or entry all the odd-

numbered sections within the thirty-mile limits shown on the diagram, and hold the even sections within the twenty-mile limits at $2.50 per acre. The even sections between the twenty and thirty mile limits are not affected by the grant.

Be pleased to promptly acknowledge the receipt of this letter and diagram.

Very respectfully, S. S. BURDETT,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 22d*, 1872.

Register and receiver, Visalia, Cal.

56 GENTLEMEN: I transmit herewith two diagrams showing the twenty and thirty mile limits of the land grant to the Atlantic and Pacific railroad, under act of July 27th, 1866, extending into your district; and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections falling within those limits, both surveyed and unsurveyed, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road was designated, by filing a plat thereof in this office, which was March 12th, 1872. The even-numbered sections within the twenty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that ratability, and only under the pre-emption and homestead laws. The even sections outside of the twenty-mile limits are not affected by this withdrawal, nor are pre-emption claims initiated prior to the right of the road attaching, March 12, 1872, affected by it.

You will please acknowledge the receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 23d*, 1874.

Register and receiver, Visalia, Cal.

GENTLEMEN: I transmit herewith two diagrams, which show the completed limits of the grant to the Atlantic and Pacific Railroad Company in your district, prepared from the maps of definite location of the road filed in the department August 15th, 1872, and although only recently accepted by the department, the rights of the company must attach to the lands from that date.

You will accordingly withhold from sale or entry all the odd-numbered sections within the thirty-mile limits shown on the diagrams, and hold the even sections within the twenty-mile limits at $2.50 per acre. The even sections between the twenty and thirty mile limits are not affected by the grant.

Be pleased to promptly acknow-edge the receipt of this letter and diagrams.

Very respectfully, S. S. BURDETT,
Commissioner.

57 Mr. SPRINGER: I offer in evidence executive orders, accepting different sections of the railroad as completed, with accompanying reports of Commissioners, marked Exhibits Nos. 7, 7*a*, 7*b*, 7*c*, 7*d*, 7*e*, 7*f*, 7*g*, 7*h*, 7*i*, 7*j*, 7*k*, 7*l*, 7*m*, 7*n*, 7*o*, which said exhibits are as follows:

EXHIBIT No. 7.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October* 3*d*, 1870.

SIR: I have the honor to transmit herewith, for your action, the report dated the 22d ultimo, of the commissioners, Messrs. G. M. Dodge, R. J. McElhany and L. A. Rourtree, appointed by you to examine and report upon the 1st and 2d sections, of twenty-five miles each, of the road and telegraph line of the Atlantic and Pacific Railroad Company, "commencing on the east line of *of* the town of North Springfield, Missouri, at station 6230, in the southeast quarter of section 12, township 29, of range 22, and terminating at station 8883, northwest quarter of section 28, township 26, of range 28, being fifty miles long."

The commissioners in their report represent that the said fifty miles of road is constructed in a substantial and workmanlike manner—ballasted throughout—and was completed, with telegraph line, on the 13th of June, 1870. That it is supplied with the necessary drains, culverts, bridges, viaducts, road crossings, turn-
58 tables, sidings, stations, watering places, rolling stock and furniture. The rails of American iron and manufacture, with a uniform gauge throughout of 4 feet 8½ inches, making a road of the first class, fully competent to transact all its business.

Also, that they are informed by officers of the company that the road is built substantially upon the line of the South Pacific railroad, which had a grant of land from the United States prior to July 27th, 1866.

I therefore respectfully recommend the acceptance of the same, and the issue to the Atlantic and Pacific Railroad Company — patents for the lands embraced in their grant on this fifty miles, deducting therefrom, however, the amount of land previously granted for the South Pacific Company, agreeably to the provisions of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

I am, sir, very respectfully your obedient servant,

W. T. OTTO,
Acting Secretary.

To the President.

(Indorsement:) Department of the Interior. October 3d, 1870. William T. Otto, acting Secretary, submits to the President report of commissioners on 1st and 2d sections (50 miles) of the road and telegraph line of the Atlantic and Pacific Railroad Co., with recommendation on the subject.

EXECUTIVE MANSION, *October 4th*, 1870.

The within recommendations are hereby approved, and the Secretary of the Interior will issue the necessary orders to carry the same into effect.

U. S. GRANT.

EXHIBIT *7a*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby
59 certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October 4th*, 1870.

SIR: I transmit herewith, for your information and appropriate action, a copy of a letter from this department to the President, dated yesterday, respecting the acceptance of the first fifty miles of the Atlantic and Pacific railroad, and of the President's order endorsed thereon.

Very respectfully, your obedient servant,

W. T. OTTO,
Acting Secretary.

Hon. Jos. S. Wilson, Com'r of the General Land Office.

EXHIBIT No. 7*b*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 11th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 31st*, 1871.

SIR: I have the honor to submit herewith, for your action, the report dated the 19th instant, of the commissioners, Messrs. Granville M. Dodge, Clark Waggoner, and R. I. McElhany, ap-
60 pointed by you to examine and report upon the third section, of twenty-five miles, of the road and telegraph line of the Atlantic and Pacific Railroad Company, "commencing at station 8883, in Pierce City, Mo., in the southwest quarter of section 28, township 26, range 28, and terminating at station 10180, in the southeast quarter of section 23, township 25, range 32."

The commissioners in their report represent that the said twenty-five miles of road is constructed in a substantial and workmanlike manner—ballasted throughout—and was completed with the telegraph line, on the 8th of December last. That it is supplied with the necessary drains, culverts, bridges, viaducts, road crossings, turntables, sidings, stations, watering places, rolling stock and furniture. The rails of American manufacture and weight 56 pounds to the yard, with a uniform gauge of 4 feet 8½ inches throughout its entire length, making a road of the first class, and fully competent to transact all business. Also that they are informed by officers of the company that the road is built substantially upon the line of the South Pacific railroad, which had a grant of land from the United States prior to July 27th, 1866.

I therefore respectfully recommend the acceptance of said twenty-five miles of road and telegraph line, and the issue to the company of patents for the lands due on account of the construction thereof, agreeably to the provisions of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

To the President.

(Indorsement:) Department of the Interior, January 31st, 1871. Columbus Delano, Secretary, submits to the President of the United States report of the commissioners on the 3d section of 25 miles of Atlantic and Pacific railroad and telegraph line, with recommendations on the subject.

EXECUTIVE MANSION, *January 31st*, 1871.

61 The within recommendations are hereby approved, and the Secretary of the Interior will issue the necessary orders to carry the same into effect.

U. S. GRANT.

EXHIBIT No. 7*c*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

[SEAL.] In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February 1st*, 1871.

SIR: The President yesterday accepted the 3d section of 25 miles of the road and telegraph line of the Atlantic and Pacific Railroad Company. I transmit herewith, for appropriate official action, a copy of my letter recommending such acceptance, with his endorsement thereon.

Very respectfully your obedient servant,

C. DELANO, *Secretary.*

The Commissioner of the Gen. Land Office.

EXHIBIT No. 7*d*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 11*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter of record, and on file in this department, and of the endorsement thereon.

62 [SEAL.] In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 4th*, 1871.

SIR: I have the honor to submit herewith, for your action, the report dated November 16th, 1871, of the commissioners, Messrs. G. M. Dodge, R. J. McElhany, and J. Dunbar, appointed by you to examine and report upon the 4th and 5th sections, of twenty-five miles each, of the road and telegraph line of the Atlantic and Pacific Railroad Company, "commencing at station 10180, in the southeast quarter of section 23, township 25, range 22, in the State of Missouri, and terminating at station 12805—25.100—1 54.100 miles—west of the crossing of the Missouri, Kansas and Texas railroad."

The commissioners in their report represent that these sections of road are constructed in a substantial and workmanlike manner—ballasted throughout—and were completed, the fourth on the 18th of June, 1871, and the fifth on the 6th of October, 1871, and that the telegraph line for this distance is also completed in a first-class manner. The rails are of American manufacture and weigh 56 pounds to the yard, with a uniform gauge of 4 feet 8½ inches throughout the entire length of this 50 miles, making a road of the first class, and fully competent to transact all business.

Also, that they are informed by officers of the company that the 4th section is built substantially upon the line of the South Pacific railroad, which had a grant of land from the United States prior to July 27th, 1866. They say of the 5th section that, that no part of it is constructed on the line of any other railroad route, to aid in the construction of which lands had been granted by the United States prior to the date last above mentioned.

I therefore respectfully recommend the acceptance of said 50 miles of road and telegraph line, and the issue to the company of patents for the land due on account of the construction thereof, agreeably to the provision of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

63

Very respectfully your obedient servant,

B. R. COWEN,
Acting Secretary.

To the President.

(Inclosure:) Secretary of the Interior, 4th December, 1871, submits to the President of the United States reports dated 16th ult., of commissioners on 4th and 5th sections, of 25 miles each, of the road and telegraph line of the Atlantic and Pacific Railroad Company with recommendations.

EXECUTIVE MANSION, *December 6th*, 1871.

The within recommendations of the Secretary of the Interior are approved, and he will give the necessary instructions to carry them into effect.

U. S. GRANT.

(Copy to General Land Office for appropriate action Dec. 8th, 1871.)

EXHIBIT No. 7*e*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 8th*, 1871.

SIR: I transmit herewith, for appropriate action, the maps of the 4th and 5th sections, of 25 miles each, of the completed portion of the Atlantic and Pacific railroad, commencing at station 64 10180 in the southeast quarter of section 23, township 25, range 22, in the State of Missouri, and ending at station 12805—25.100—1 54.100 miles—west of the crossing of the Missouri, Kansas and Texas railroad. I also send a copy of the letter of the 11th instant, from this department to the President of the United States, recommending the acceptance of the said 50 miles, and of the President's endorsement thereon, dated 6th instant.

Very respectfully your obedient servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Com'r of the General Land Office.

EXHIBIT No. 7*f*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 11th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec. 15th*, 1880.

SIR: I have the honor to submit herewith, for your consideration, the report of Messrs. Hoyt Sherman, J. E. Bloom and A. B.

Nichols, who were appointed by you commissioners to examine the sixth section of the railroad and telegraph line constructed by the Atlantic and Pacific Railroad Company. The section begins at a point in T. 8 N., R. 2 E., near Isleta, at the junction with the New Mexico and Southern Pacific railroads, runs westwardly, and ends at a point fifty miles from the place of beginning, all in the Territory of New Mexico.

65 The commissioners report said section to be built in a workmanlike and creditable manner, and in substantial compliance with law and the instructions of this department. I therefore recommend that said section be accepted by you, and that patents for lands earned by the construction thereof be issued to said company, pursuant to the 4th section of the act approved 27th of July, 1866 (14 Stat., 295).

Very respectfully, C. SCHURZ, *Secretary.*

To the President.

(Inclosure:) The Secretary of the Interior, December 15th, 1880, submits report of commissioners, Sherman, Bloom and Nichols, on 6th section (*a*) of the Atlantic and Pacific railroad, in New Mexico, and recommends acceptance of the section.

EXECUTIVE MANSION, *Dec. 17th*, 1880.

The recommendations of the Secretary of the Interior herein are hereby approved.

R. B. HAYES.

(*a.*) This section is called the 1st and 2d sections (25 miles each) Western division, by the R. R. Co.

EXHIBIT No. 7*g*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

[SEAL.] In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C. *December 17th*, 1880.

SIR: I enclose herewith copy of letter addressed to the President by me, on the 15th instant, transmitting report of commis-
66 sioners appointed by him to examine fifty miles of the Atlantic and Pacific railroad, lying immediately westward of

the Rio Grande at Isleta, New Mexico, and recommending that the section (6th) be accepted, and that the lands earned by the construction thereof be issued to the Atlantic and Pacific Railroad Company, together with copy of the President's indorsement thereon, approving the recommendations. I also transmit herewith the map and profile of said section, which accompanied the report of the commissioners, that you may carry out the President's order.

Very respectfully, C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

EXHIBIT No. 7*h*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 11th*, 1892.

Pusuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 15th*, 1881.

SIR: I have the honor to submit herewith, for your consideration, the report of Messrs. J. N. W. Rumple, Robert Bell and H. Blackstone, who were appointed by you commissioners to examine two sections, of twenty-five miles each, of the Atlantic and Pacific railroad. These sections are known as sections three and four of the Western division of said road. They begin at a point fifty miles west of the junction of said road with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and end one hundred miles from said junction.

67 The commissioners report said sections as constructed in a good and workmanlike manner, and in substantial compliance with the requirements of law and the instructions of this department. I therefore recommend that said sections of railroad and telegraph line be accepted, and that patents for the lands earned by this construction be issued to the Atlantic and Pacific Railroad Company, pursuant to section 4, of the act of July 27th, 1866 (14 Stat., 295).

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To the President.

(Indorsement:) The Secretary of the Interior, 15th April, 1881, submits report of commission on 3d and 4th sections, 25 miles each, Western division of the Atlantic and Pacific railroad and recommends their acceptance.

EXECUTIVE MANSION, *April 18th*, 1881.

The within recommendations of the Secretary of the Interior are hereby approved.

JAMES A. GARFIELD.

(Copy, together with map and profile, to the Commissioner of the General Land Office, April 19th, 1881.)

EXHIBIT No. 7*i*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be [SEAL.] affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

68 WASHINGTON, D. C., *April 19th*, 1881.

To the Commissioner of the General Land Office.

SIR: I enclose herewith, for your information and appropriate action, copy of my letter of the 15th instant to the President, submitting the report of Messrs. Rumple, Bell and Blackstone, who were appointed commissioners to examine fifty miles of the Atlantic and Pacific railroad, (3d and 4th sections, Western division), with the President's indorsement thereon, approving my recommendations that the sections be accepted and patents for lands earned by their construction issued. The map and profile of the sections are herewith.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

EXHIBIT No. 7*j*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be [SEAL.] affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 3d*, 1882.

SIR: I have the honor to submit herewith the report of Messrs. R. D. Mussey, E. C. Dean and Simon Stevens, whom you appointed commissioners to examine the fifth, sixth, seventh, and eighth sections (25 miles each) of the Western division of the Atlantic and Pacific railroad, beginning at a point in the Territory of New Mexico, one hundred miles west of the junction of said road,
69 near Isleta, with the New Mexico and Southern Pacific railroad, and ending at a point in the Territory of Arizona one hundred miles west of the place of beginning.

The commissioners report said section as constructed in substantial compliance with law and the instructions of this department. The accompanying telegraph line they also report as having been properly constructed. In accordance with what I understand to be the ruling of the Supreme Court of the United States, the opinions of the Attorney General, and the action of this department heretofore, I recommend that said sections of railroad and telegraph line be accepted, and that the lands earned by the construction be patented to the Atlantic and Pacific Railroad Company pursuant to law.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To the President.

(Indorsement:) The Secretary of the Interior, January 3d, 1882, submits with recommendations report of Messrs. Mussey, Dean and Stevens, on 5th, 6th, 7th and 8th sections of Western division of Atlantic and Pacific railroad, in New Mexico and Arizona.

EXECUTIVE MANSION, *January 5th*, 1882.

The within recommendations of the Secretary of the Interior are hereby approved.

CHESTER A. ARTHUR.

(Copy *of* G. L. O. Jan. 7th, 1882.)

EXHIBIT No. 7*k*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed
70 [SEAL.] my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

WASHINGTON, *January 7th*, 1882.

The Commissioner of the General Land Office.

SIR: I transmit herewith, for appropriate action, copy of my letter of the 3d instant, to the President, submitting with recommendations the report of Messrs. R. D. Mussey, E. C. Dean and Simon Stevens, commissioners, on the 5th, 6th, 7th and 8th sections, of 25 miles each, of the Western division of the Atlantic and Pacific railroad, beginning at a point one hundred miles west of Isleta, New Mexico, and ending at a point in Arizona one hundred miles from the place of beginning, with the President's endorsement thereon, approving the recommendations. The map and profile accompanying the report are also transmitted herewith.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

EXHIBIT No. 71.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 11th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record and on file in this department, and of the endorsement thereon.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 13th*, 1882.

71 SIR: I have the honor to submit herewith the report of Messrs. William Sooq Smith, Edward W. Kinsley and Dwight K. Tripp, whom you appointed commissioners to examine two hundred and fifty miles of the Atlantic and Pacific railroad. They report said ten sections as constructed in substantial compliance with law and the instructions of this department. Two of the sections, 6th and 7th, of the Central division, lie in the Indian Territory, beginning at a point 1.54 miles west of the crossing of the Missouri, Kansas and Texas railroad, and ending at a point 54 miles westward of the place of beginning. Eight of the sections, from 9th to 16th, both inclusive, Western division, lie in the Territory of Arizona, beginning at a point 200 miles west of the junction of this railroad with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and ending at a point 200 miles westward of the place of beginning. I have therefore the honor to recommend that you accept the said ten sections of railroad and telegraph line, and that patents for the lands earned by the construction of the sections in the Territory of Arizona be issued to the Atlantic and

Pacific Railroad Company, on their compliance with the law and regulations in such cases made and provided.

Very respectfully, H. M. TELLER, *Secretary.*

To the President.

(Indorsement:) Department of the Interior. December 13th, 1882. H. M. Teller, secretary, submits to the President report of commissioners on ten sections of the Atlantic and Pacific railroad, 25 miles each, two in Indian Territory and eight in the Territory of Arizona.

EXECUTIVE MANSION, *December 14th*, 1882.

The within recommendations are approved.

CHESTER A. ARTHUR.

(Copy, with maps and profiles to General Land Office, with letter Dec. 16th, 1882.)

72 EXHIBIT No. 7*m*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 2d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

WASHINGTON, D. C., *December 16th*, 1882.

The Commissioner of the General Land Office.

SIR: I transmit herewith, for appropriate action, copy of my letter of the 13th instant to the President, submitting the report of commissioners on 250 miles of the Atlantic and Pacific railroad and telegraph line, recommending their acceptance and the issue of patents for the lands earned by the construction of the 200 miles in the Territory of Arizona, on compliance by the company with the laws and regulations in such cases made and provided, with the President's endorsement thereon, of the 14th instant, approving the recommendations. The maps and profiles accompanying the report are also herewith.

Very respectfully, H. M. TELLER, *Secretary.*

EXHIBIT No. 7*n*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 11, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of rec-

ord and on file in this department, and of the endorsement thereon.

73 In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior [SEAL.] to be affixed, the day and year first above written.

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October* 29, 1883.

SIR: I have the honor to submit herewith the report of Messrs. Elihu Coleman, James F. Legate and Ed-in W. Dike, whom you appointed commissioners to examine six sections, of twenty-five miles each, of the Atlantic and Pacific railroad and telegraph line in Arizona Territory. Said sections, numbered 17, 18, 19, 20, 21, and 22, respectively, begin at a point four hundred miles west from Isleta, New Mexico, and running westward, and at a point one hundred and fifty miles from the place of beginning.

The commissioners report said sections as constructed in substantial compliance with law and the instructions of this department. I therefore recommend that you accept said sections, and that patents for lands earned by their construction be issued to the Atlantic and Pacific Railroad Company, on their compliance with the regulations in such cases made and provided.

Very respectfully, H. M. TELLER, *Secretary.*

To the President.

(Indorsement:) Department of the Interior, Oct. 29th, 1883. H. M. Teller, Secretary, submits to the President report of commissioners on six sections, of 25 miles each, of the Atlantic and Pacific R. R. in Arizona Territory.

EXECUTIVE MANSION, *October 30th,* 1883.

The within recommendations are approved.

CHESTER A. ARTHUR.

(Copy, with maps and profiles, to G. L. O., Nov. 3d, 1883.)

74 EXHIBIT No. 7*o*.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 2*d*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original letter, of record in this department.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

WASHINGTON, D. C., *November 3d*, 1883.

The Commissioner of the General Land Office.

SIR: I inclose herewith, for appropriate action, copy of my letter of the 29th ultimo, to the President, submitting, with recommendations, the report of Commissioners Elihu Coleman, James F. Legate and Edwin W. Dike, on six sections (150 miles) of the Atlantic and Pacific railroad, in Arizona Territory with the President's indorsement thereon approving the recommendations. The maps and profile accompanying the report are also herewith.

Very respectfully, H. M. TELLER, *Secretary.*

Mr. SPRINGER: I offer in evidence Executive correspondence and decisions relative to the rights of the Atlantic and Pacific Railroad Company, in the Indian Territory and elsewhere, marked Exhibit No. 8, and which is as follows:

75 EXHIBIT No. 8.

Executive Correspondence and Decisions in Reference to Rights of Atlantic and Pacific Railroad Co. in Indian Territory and Elsewhere.

BOSTON, *April 5th*, 1870.

The Honorable J. D. Cox, Secretary of the Interior, Washington, D. C.

SIR: In behalf of the Atlantic and Pacific Railroad Company, I beg leave to inform you that in a few months its road will be graded to the western boundary line of the State of Missouri, and it becomes necessary to take measures for making a survey for the line of road through the Indian Territory to secure the grants to this company under the act of Congress of July 27, 1866.

Will you please instruct me what course the company may pursue in reference to such survey, and to secure the right of way and land through said Territory, granted by said act, in order that no unnecessary delay may occur in promoting the work of constructing the road?

Very respectfully your obedient servant,

FRANCIS B. HAYES, *President.*

BOSTON, *April 15th*, 1870.

(Present address, 1321 F St., Wash'n, D. C.)

Hon. J. D. Cox, Secretary of the Interior, Washington, D. C.

SIR: Referring to my late letter to you, I would state that it was written especially to obtain early information in respect to the best course for the Atlantic and Pacific Railroad Co. to take relative to making preliminary surveys through the Indian country. I desire now to receive such suggestions as the department, at its convenience, may incline to give me as to making early surveys, pre-

paratory to locating our line of railroad west of the western boundary lines of Missouri and Arkansas.

I have the honor to be,

Very respectfully, your obedient servant,

FRANCIS B. HAYES, *President.*

76 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 13th*, 1870.

SIR: You will immediately instruct the several superintendents and Indian agents having charge of the Indians in the Indian Territory, that no railroad company will be allowed to enter that Territory for the purpose of constructing a railroad until their right so to do has been passed upon by this department; and that, if any company should proceed to construct their road without such recognition and authority, the military power of the Government will be called upon to remove and eject the agents and employés of such company.

Very respectfully, J. D. COX, *Secretary.*

Hon. E. S. Parker, Commissioner Indian Affairs.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 14th*, 1870.

SIR: On application made by the Union Pacific Railway Company, Southern branch, a hearing will be had before the Secretary of the Interior on Wednesday next, the 18th inst., at 10 o'clock a. m., upon the rights of railway companies through the Indian Territory. You are requested to be present at that time.

Very respectfully, W. T. OTTO,
Acting Secretary.

Francis B. Hayes, Esq., pres't At. & Pac. R. R. Co., No. 1321 F St., Wash'n, D. C.

Executive Document, Department of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 21st*, 1870.

SIR: On the 13th instant, upon a complaint filed in this department by the duly authorized delegates of the Cherokee nation, averring that parties alleging themselves to be working parties of the Southern branch Union Pacific Railway Company,
77 had entered the Cherokee country and were employed in grading a line for a railway, the officers of said railway company were notified by this department that the Cherokee Indians did not recognize their right to intrude upon their territory, and that no work of the kind referred to could be permitted therein until the Executive should be satisfied, by evidence submitted through this department, that such entry and occupation were in accordance with law. A similar notice had been given on the 27th ultimo to the officers of the Kansas and Neosho Valley Railway Company, who

were reported to have entered the Quapaw reservation, near the town of Baxter, in southeastern Kansas.

On Wednesday, the 18th instant, the said Southern branch Union Pacific Railway Company appeared by their counsel and moved for the revocation of said notification and order with respect to them, and the Cherokees, the Creeks, the Kansas and Neosho Valley Railroad Company, the Leavenworth, Lawrence and Fort Gibson Railroad Company, and the Atlantic and Pacific Railroad Company, appeared by counsel to represent their several interests in the questions involved.

The point submitted for the consideration of the department and for your determination is, What rights have been given to the railroad companies to construct railroads through the Indian Territory, and what railroads, if any, are entitled to such privileges and right of way?

In the year 1866 a series of treaties were negotiated with the Cherokees, the Creeks, the Choctaws, the Chickasaws, and the Seminole Indians, in which stipulations were made permitting railroads to be constructed in the Indian Territory. At the same time laws were enacted by Congress authorizing the several railroad companies named, under certain conditions, to approach the boundary of the Indian country on the north or on the east, with a view to the construction of, at least, one railway from north to south through the Indian Territory, from Kansas to eastern Texas, and at least one railway through the Indian Territory, from east to west, from Missouri or Arkansas to northern Texas.

On the part of the Indians it is claimed that the whole scheme of treaties and of legislation looked to the construction of but a
78 single trunk road through the Territory, from north to south, and, so far as the Cherokee nation is concerned, for the like construction of but a single road through its territory, from east to west.

On the part of the Kansas and Neosho Valley road, the Leavenworth, Lawrence and Fort Gibson road, and the Atlantic and Pacific road, the interpretation given by the Indian- to the treaties and laws was admitted to be the correct one. The Southern branch Union Pacific Company denied that interpretation, and insisted that the meaning of the legislation and of the treaties was to give the right of way to as many roads as might in any manner be authorized by Congress to enter the Territory. It was admitted by all parties that the acts of Congress of July 25th, 26th and 27th, 1866, granting lands and privileges to the Kansas and Neosho road, the Southern branch Union Pacific road, and the Atlantic and Pacific road, respectively, and the several Indian treaties referred to, were all essentially parts of the same transaction, and were to be taken and construed together for the purpose of determining the scheme which was intended to be legalized by Congress.

The act granting lands for the Kansas and Neosho Valley road declared that it was to aid said company "to construct and operate a railroad from the eastern terminus of the Union Pacific railroad, Eastern division, at the line between Kansas and Missouri, at or near

the mouth of the Kansas river, on the south side thereof, southwardly through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red river with a railroad now being constructed from Galveston to Red river, at or near Preston, in Texas." Section eight of that act authorized said company "to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory to Red river, at or near Preston, in the State of Texas," and gave "the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved, to the United States by treaty with the Indian tribes," and wherever such right of way should not be reserved the consent of the Indian tribes interested was declared to be necessary, which consent, with all its terms and conditions, should be previously approved and indorsed by the President and filed with the Secretary of the Interior. The eleventh section of
79 the act provided that after this railroad shall be located to the valley of the Neosho river, any other railroad company duly chartered might connect, unite and consolidate with it upon equitable terms, and that "should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas, where the line of said Kansas and Neosho Valley railroad shall cross the same before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas." This act was approved July 25th, 1866.

On the next day the act was approved giving aid to the Union Pacific Railway Company, Southern branch, which provided for aiding that company "to construct and operate a railroad from Fort Riley, Kansas, down the valley of the Neosho river to the southern line of the State of Kansas, with a view to the extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas."

Section eight of that act declared that said company was "authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers to Fort Smith, in the State of Arkansas," and the right of way through said Indian Territory to the extent of one hundred feet on each side of the road purported to be granted by said section. Section eleven further provided that after said road should be located to the valley of the Neosho and Grand rivers, other duly chartered roads might consolidate with it in a similar manner to that provided in section eleven of the act giving aid to the Kansas and Neosho Valley road.

It was claimed on behalf of the Southern branch Union
80 Pacific road, first, that the act just referred to was complete in its terms, and did not recognize any community of interest in any part of its line with any other road; and, secondly, that the consent of the Indians, required by said act, was given in the Cherokee treaty of 1866. In admitting, however, as was distinctly done, that the several acts and treaties were to be taken and construed together, I am of the opinion that the interpretation sought to be given by this company to its own charter, and to the treaties, is practically abandoned. Its authorized route is down the valley of the Neosho and Grand rivers. The Grand river is formed by the junction of the Neosho with a smaller stream called Spring river, and the Neosho crosses the southern line of the State of Kansas and enters the Indian Territory before uniting with Spring river.

In like manner the Kansas and Neosho Valley road has its route indicated not only by its name, but in section eleven of its act, which has already been quoted. Its consolidation with other companies is permitted after it shall have located its line "to the valley of the Neosho river." The same section distinctly declares that these roads shall have a common point at the southern line of the State of Kansas.

It is hence demonstrated that both roads must be in the valley of the Neosho river, where it crosses the southern boundary of Kansas, in order to fulfill the terms of the acts under which alone they have the power to enter the Indian Territory, or obtain any right of way through the same. For that common point in the common boundary between Kansas and the Indian Territory, the three roads named were to run a race, and the one first reaching that point was to have the right of way southward through the Indian Territory to Preston, in the State of Texas. Whatever latent ambiguity, therefore, there might be in the act authorizing the Southern Branch Union Pacific railroad to enter the Indian Territory, seems to me to be thus perfectly explained when the terms of the two acts are carefully compared. This view of the case is decisively sustained by the debates in Congress on the passage of both acts.

On the 13th of June, 1866, in the debate in the Senate on the Kansas and Neosho bill, Senator Hendricks, who appeared to champion the interests of the Leavenworth, Lawrence and Fort
81 Gibson road, declared that the proposition was to start a railroad "opposite Kansas City, in Missouri, and to run down until it shall intersect the road to which we made a grant three years ago, and whichever road can get to the southern boundary of the State of Kansas first is to have the right to run through the Indian Territory. That is the proposition." To this Senator Pomeroy, who, in like manner appeared to advocate the interests of the Kansas and Neosho road, responded that "the proposition was a fair one." Mr. Hendricks still objected that prior rights granted to the earlier incorporated road would be thus improperly interfered with.

On the 20th of June the debate was again renewed. Mr. Hendricks said:

"The eleventh section proposes to make a contest between three companies for the right of way through the Indian country and the right to build a railroad through the Indian country. This bill proposes that these three roads shall meet at the southern boundary of Kansas, and then it shall be a race of speed for the right to construct the trunk road from that point through the Indian country to the northern boundary of Texas."

This was again assented to by all the Senators taking part in the debate as being the true meaning and intent of the bill.

On the 22d of June, the same bill being again under discussion, Mr. Henderson, chairman of the committee having the same in charge, said:

"In order that the Senate may understand what the proposition is, I will state that this section (the eleventh) provides, inasmuch as there are several roads running down to the southern borders of Kansas, that whichever road gets to the southern limits of Kansas first shall take the grant, and go on to the gulf of Mexico. That is all that this section does. Instead of leaving it open for various competing lines hereafter to ask for several roads through the Indian country, it provides that whatever company completes its road down to the southern borders of Kansas first shall take the grant and build the road to the Gulf, and that there shall be but one road built in that direction."

Mr. Pomeroy said:

"In addition to what the Senator from Missouri has said,
82 I desire to say this: "The grant beyond the southern line of Kansas is simply the grant of the right of way, with the consent of the Indians. It is not a grant of land, but of right of way with the consent of the Indian tribes, and all the tribes have made treaties consenting to it except one."

By referring to the date at which the several treaties referred to were executed, it will be seen that the treaty with the Choctaws and Chickasaws was concluded on the 26th day of April, 1866; that with the Creeks was concluded on the 14th day of June, 1866; but that with the Cherokees was not concluded until the 19th day of July in the same year. It is therefore clear that the treaty with the Cherokees was that referred to by Mr. Pomeroy in the quotation above given, and that it was the distinctly stated meaning of the act that these roads were to run through the lands of the Indian tribes, whose treaties thus made a complete right of way for a trunk road from Kansas to Texas. If anything more were needed to prove that the common point of meeting at the northern boundary of the Indian Territory was fixed in the valley of the Neosho river, where that river crosses the southern line, the evidence thus adduced would be conclusive. East of the Neosho river, and bounded upon it, in the northeast corner of the Indian Territory, are several small Indian reservations of the Quapaws, Senecas, and others. To reach the Cherokee country, and in order to have a complete and perfected right of way, it was necessary that the railroads should enter the

Indian Territory at its crossing by the Neosho river, or on the westward side of that stream. That the act granting aid to the Southern branch Union Pacific Railroad Company did not conflict with this interpretation is clear, not only from the comparison made of the language of the statutes themselves, in the light of the debates already referred to, but when the last-named bill was itself before the Senate, on the 3d day of June, the debate shows that the opposition which had been, to a certain extent, made by Mr. Hendricks, on the part of the Leavenworth, Lawrence and Fort Gibson Railroad Company, to the general scheme, had been abandoned. In that debate he spoke as follows:

"I will state to the Senator from Michigan that I thought two weeks ago that we ought to confine the grant to Galveston
83 bay, or rather to the northern boundary of Texas, to the road to which we made the grant three years ago, but the Senate did not concur in that view, and this is part of the policy agreed upon two weeks ago by the Senate."

Mr. GRIMES: "There is one question I should like the Senator from Indiana to answer."

Mr. HENDRICKS: "I am not going to answer many questions."

Mr. GRIMES: "I should like to know whether the Senator has investigated the subject sufficiently so as to satisfy himself that if we pass this bill we will not mar the symmetry and beauty of that zebra-marked map which he exhibited to the Senate the other day, showing these additional railroad lines?"

Mr. HENDRICKS: "No, sir."

Mr. GRIMES: "If so, I am satisfied with the bill."

Mr. HENDRICKS: "I will state to the Senator that from a point about seventy miles south of the southern boundary of Kansas it will start a new system of marks in a southeasterly direction, to Fort Smith, and with that addition it will leave the maps as they are already marked."

By an examination of the map it appears that Fort Gibson, the original point of termination of the Leavenworth, Lawrence and Fort Gibson road, is at the mouth of Grand river, where it flows into the Arkansas, and is, therefore, at the southern end of that portion of the trunk road which passes through the Cherokee country, the country south of the Arkansas river belonging to the Creeks. The direction from Fort Gibson to Preston, in Texas, is southwest. To reach Fort Smith the road must descend the valley of the Arkansas river to the southeast. It also appears by the section lines on the map that the distance in a straight line from the Kansas line to Fort Gibson is very little over the distance named by the Senator. We also find that in the ordinary official maps, published shortly after the passage of these acts, on which the officers of this department have marked the projected routes as nearly as they could then be ascertained from the representatives of the companies themselves, that the Neosho valley, at the point where the river crosses the southern boundary of Kansas, is laid down as the common point of junction for these roads, and Fort Gibson as the point at
84 which the road to Preston diverges from the road to Fort

Smith. Without reference, therefore, to the Indian treaties, I think it is as clear as evidence can make it, that the construction I have indicated as the scheme intended by Congress is that which is really contained in the laws. A glance at the treaties will only add strength to the conclusion by cumulative evidence.

The general scheme which has been referred to, in providing for a trunk road running north and south through the Indian Territory, from the Neosho valley to Preston, in Texas, implied necessarily that the road should traverse the country of the Cherokees, of the Creeks, of the Choctaws, and to some extent at least, that of the Chickasaws. The road from east to west provided for a northern branch traversing the Cherokee country, and that of the Creeks; its southern branch, running up the Canadian, would traverse the country of the Choctaws, the Creeks, and the Seminoles, with a possibility of entering the Chickasaw country.

It will thus be seen, from a glance at the map, that through the Seminole country a single east and west road was the only one entering into the general plan, while through the Creek and Chickasaw country, as well as the Cherokee, a road in each direction was contemplated. If, then, we turn to the treaty with the Seminoles, which was the first of the series, we find it declared in article five:

"The Seminole nation hereby grant a right of way through their lands to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents and employés, shall be subject to the laws of the United States relating to the intercourse with Indian tribes; and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose."

If the words "any company" in the above quotation stood alone there might be doubt as to whether more than one company was intended; but when, in a subsequent clause of the same paragraph, the words "said railroad company," in the singular number, are used, it becomes entirely clear that but one company was meant, and that the word "any" meant only one company, and not several companies. In article six of the treaty with the Choctaws and Chickasaws similar language is used, authorizing the construction of "a railroad through the Choctaw and Chickasaw nation from the north to the south thereof, and from the east to the west side thereof;" and, subsequently, provides that "such railroad company, or companies, with all its or their agents and employés, shall be subject to the laws of the United States relating to intercourse with the Indian tribes; and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose."

If it had been intended that this treaty should provide for any number of companies traversing the country that Congress might direct, there could have been no reason for using the cardinal points of the compass in describing the route of a road from north to south,

and a road from east to west; but it would have been both more natural and more simple to have said merely that authority and right of way was granted to any railroad companies that might run through their territory under permission of acts of Congress, without specifying either number or direction. As the language stands, its most natural interpretation seems to me to be clearly in accord with what I have shown to be the general scheme provided by the congressional acts.

In the fifth article of the Creek treaty, while the language evidently has the same meaning as that which I have attributed to the Choctaw and Chickasaw treaty, it is more distinctly explicit. It declares:

"The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents and employés, shall be subject to the laws of the United States relating to intercourse with Indian tribes; and also to such rules and regulations as may be prescribed by the Secretary of the Interior, &c."

86 In this case the anxiety to avoid the appearance of consenting to more than one road in each direction has been evidently so great as to lead, if the words were taken alone, to a doubt in the other direction as to whether both roads were not intended to be under the control of a single corporation.

When we come to the treaty with the Cherokees, which was the last of the series, and the one which has been mentioned in the quotation from the Senate debate which I have given, and was the one which completed the scheme of railroad communication through the Territory, its eleventh article we find provides for the similar grant of a right of way "to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west, of and which may pass through the Cherokee nation."

The language here being almost identical with that used in the two preceding treaties, is so manifestly intended to indicate part of one system that even without the light thrown upon it by the debate in Congress, and by the terms of the several statutes pertaining to the railroad companies, it would seem to me to be clear that the interpretation insisted upon by the Cherokee delegation is the true one, and that it was the intention to provide for but a single road from north to south and a single road from east to west through the Cherokee country. We have, however, before us the further statement of Senator Harlan, who was Secretary of the Interior at the time this treaty was made, of Messrs. William A. Phillips and J. W. Wright, whose names are appended to it as witnesses, that the interpretation I have given was in fact the one, and the only one intended, and declared at the time the treaty was made. Whether,

therefore, we look to the language of the treaty and the statutes taken together, without the aid of extraneous testimony, or seek in the congressional debates, in the statements of those who were parties to the transaction or witnesses thereto, to discover what was in reality intended between the United States and these Indians under its protection, we are brought to the same conclusion by a course of reasoning which seems to me entirely irrefragable.

The only other point I deem it necessary to refer to in seek-
87 ing the meaning of the statutes and the treaties is in regard to the consent of the Indians, in accordance with which, and not otherwise, the Southern branch Union Pacific road was authorized to extend its line to Fort Smith. I think it is here equally clear, upon a comparison of the statutes, that it was intended that in so far as the line of this road should necessarily depart from the main trunk, running through the Neosho valley to Preston, in Texas, it should do so only upon obtaining the consent of the Indian tribes through whose lands such diverging part of the road might go. As has been already remarked, it was distinctly declared in the Senate, without contradiction, that such divergence would commence at a point somewhere about seventy miles south of the Kansas boundary line, and it is entirely clear that it was supposed that Fort Gibson was the point referred to. I accordingly find such to be the proper meaning and intent of the statutes in that regard.

The only question which now remains to be determined is, whether either, and if so, which of the railroad companies engaged in the race from points in Kansas for the northern boundary of the Indian Territory, has performed the conditions necessary to acquire the right to construct the trunk road north and south through the Indian Territory.

I find that Mr. Joy, one of the principal stockholders and directors of the Kansas and Neosho Valley Railroad Company, in the year following the passage of the acts and the ratification of the treaties which have been mentioned, procured the possession by purchase of the tract of land in southeastern Kansas immediately north of the boundary of the Indian Territory, known as "the Cherokee neutral lands," and that soon after this purchase the line of said railway company was located due north and south through the greater part of said Cherokee lands, and nearly, if not exactly, upon the line dividing the lands so purchased into two equal eastern and western parts; that the construction of the road upon this line, which I believe to have been made for the purpose of giving, as nearly as possible, equally increased values to the lands so purchased in all their parts, has taken this road off the line necessary to intersect the Indian boundary line at the Neosho river, or near the same; and that the road has, in fact, been constructed to
88 a point on the Indian boundary line, about ten or more miles east of said Neosho river, touching the reservation of the Quapaws, through which no power to pass has been granted by treaty or by consent of the Indians holding that and several other small reservations in the northeastern corner of the Territory. I

find, further, that the point where said Kansas and Neosho Railroad Company has touched the southern boundary of Kansas and the northern boundary of the Indian Territory, is not one reasonably within the meaning and purpose of the general scheme which I have found to have been fixed by the legislation and treaties referred to. In addition to these considerations, I would submit that it would be manifestly unfair and inequitable if one company were allowed, at its own will, to change the plan of route so as to shorten its own line to the common point, and lengthen that of its competitors by a distance which might be twenty-five miles, or equal to that from the Neosho river to the Missouri boundary line. I therefore find that the Kansas and Neosho Railroad Company is not authorized, at present, under said legislation, to enter the Indian Territory and build the trunk line aforesaid, and that to complete its right at this time to do so, it would have been necessary for said road to have been completely constructed to a point in the Neosho valley at or near the crossing of the boundary line by the Neosho, and where it could enter the Cherokee country without crossing the reservation of any other Indian tribe. This the said company has not done.

As to the Southern branch Union Pacific Railroad Company, I find that its line of road is in substantial accord with the scheme fixed by the legislation and treaties, but that said company has not built a completed line of railroad up to this date to the crossing of the Indian boundary line. I find, further, that the said railroad company, without completing its said road to the aforesaid common point of crossing the Indian boundary, has gone on in advance to grade within the Indian Territory, and is, therefore, an intruder within said Territory, and that the complaint of the Cherokee nation in regard to them is well founded.

As to the Leavenworth, Lawrence and Fort Gibson road, it is not averred on its behalf that it is now in a condition to claim the right of entry to the Indian Territory.

89 As to the Atlantic and Pacific Company approaching the Indian Territory upon the east, I do not find that its claim to cross the Cherokee country is disputed by any other corporation authorized to build a road in that direction; but not having had fully before me the facts requisite to determine whether said company has fulfilled all the conditions precedent to entering the Territory, and it being admitted that its road has not yet reached the neighborhood of the eastern boundary line of the Territory, it is not necessary now to pass finally upon its rights.

If you shall agree with me in the conclusions I have reached, it is apparent that, inasmuch as it may soon be necessary to decide which company shall first completely fulfill the conditions upon which its right to enter the Territory may depend, some means should be taken to have such determination made in a manner calculated to avoid disputes between any of the parties in interest and the Indians, and to avoid breaches of the peace which might arise out of such disputes.

I would therefore respectfully recommend that the superintendent

for the central Indian superintendency, and the military officer acting as the superintendent for the southern Indian superintendency, be appointed by you a commission to determine which of the said railroad companies shall first fully comply with the conditions of the statutes as the same have been hereinbefore defined, and to report to this department when such complete fulfilment shall have taken place; that an executive order be issued declaring that no railroad company shall be permitted to enter said Indian Territory for the purpose of grading or constructing a railroad until such report shall have been received and approved by yourself, and a formal permission given.

There is incidentally connected with the discussion of these questions the further one as to the propriety of giving approval to the construction of other railroads through the Indian country than those which may be built in strict accordance with the scheme fixed by the treaties and by legislation.

The policy of preserving the Indian Territory as free as possible from intrusion by white settlers, under any form, has been
90 hitherto regarded as firmly established in this country. It has been based upon the well-known fact that the Indian tribes which are brought into closest contact with the whites have been uniformly injured by drunkenness, and other vices which they have seemed peculiarly unable to resist, and the only hope of their complete civilization seems, by common consent, to rest upon our ability to keep them by themselves, under stringent laws with regard to the introduction of intoxicating liquors, and in circumstances where immoral intercourse with the whites shall be prevented as thoroughly as possible.

The intelligent men among the civilized Indians fully appreciate the necessity of this policy, and their delegations have been extremely earnest in deprecating any course which may throw them into closer contact or more direct competition with our people than is absolutely necessary. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out with any degree of success it is necessary to adhere to it as firmly as possible.

We cannot honestly advise the scattered and small tribes now within our organized States to migrate to the Indian country, except upon the honest assurance that there, with the advantages of teachers and mission establishments, and protected from the temptations which have heretofore been so ruinous to them, they may work out the problem of their possible civilization and final incorporation into the nation.

I therefore most earnestly advise, inasmuch as in the wisdom of Congress the scheme involving the building of but one trunk railroad through the Territory from north to south, with a branch from Fort Gibson to Fort Smith, and a double line from east to west, meeting in the valley of the Canadian, has been deemed sufficient for the necessities of our own commercial intercourse between dif-

ferent sections of the country, that this scheme be rigidly adhered to, and that no approval be given to any deviation therefrom.

I am, sir, with great respect, your obedient servant,

J. D. COX, *Secretary.*

To the President.

91 EXECUTIVE MANSION, *May 23d*, 1870.

The views and findings of the Secretary of the Interior herein are approved, and his recommendations will be carried into execution.

U. S. GRANT.

WASHINGTON, D. C., *Nov. 29th*, 1870.

The Honorable J. C. Delano, Secretary of the Interior, Washington, D. C.

SIR: The line of the Atlantic and Pacific Railroad Company, as appears by the maps and documents in the office of the Department of the Interior, has been located and approved by that department for a distance of seventy-five miles west of its initial point, at or near Springfield, in Missouri.

About three years since this company filed in the office of the Department of the Interior a map showing the general route through the State of Missouri to the western boundary of that State, at or near Seneca, Missouri, which route was also approved by the department.

Under the treaty with the Cherokee Indians the right of way is given to this company, respresenting the east and west road through the Cherokee reservation, but the United States, though giving this company by its charter a right of way for the entire length of its road, has not secured for the company the right of way from the small tribes occupying that portion of the Indian Territory lying between Grand river and the State of Missouri, being a distance of about eight and one-half miles within the Indian Territory, and immediately east of the Cherokee reservation, the Grand river being the eastern boundary of the Cherokee nation.

The Secretary of the Interior during last summer directed the undersigned to cause surveys of the country to be made west of the present terminus of the located line near Neosho, Missouri, to determine which line was best for the company to adopt. Accordingly, surveys have been carefully made of all the country between Neosho and the Cherokee reservation, and for several miles within the latter reservation, and I have the honor to submit these

92 surveys for the information of the department, with the profiles of the different routes and the engineers' reports, the three lines shown on the maps being the best railroad routes which could be found in that portion of the country.

It is ascertained, as will appear by the accompanying maps and engineers' reports, that the line running west of Neosho, by the way of Seneca, in Missouri, and from Seneca to Lost Creek, through a corner of the Shawnee reservation and a portion of the Wyandottes, across Grand river to the Cherokee reservation, has the best align-

ment and the lowest gradients, and is altogether the shortest and best line for the public, as well as for the company constructing this national road.

Having been permitted by the Secretary of the Interior to open negotiations with the small tribes of Indians occupying the land between Seneca, in Missouri, and Grand river, in view of obtaining the right of way and other lands and privileges for railroad purposes, as authorized by its charter, this company finds a friendly disposition manifest by the Shawnees and Wyandottes to allow the company what is desired.

I now have the honor to respectfully ask, in behalf of the Atlantic and Pacific Railroad Co., the approval by you of the route from the western terminus of the present location of the road near Neosho, Mo., through Seneca and the Shawnee and Wyandotte reservations into the Cherokee, a distance of about 27 miles, as shown by the accompanying map; and also permission to continue negotiations with the Indian tribes for the right of way, depot lands, and thereby enable this company to prosecute its work without delay, and complete its second section of fifty miles of road and telegraph line within the time limited by its charter.

I have the honor to be, very respectfully, your obedient servant,

FRANCIS B. HAYES,
Pres't A. & P. R. R. Co.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *March 4th*, 1871.

93 SIR: I have the honor to report that I am in receipt of a letter, bearing date the 14th of January last, from C. J. Hillyer, Esq., attorney for the Atlantic and Pacific Railroad Co., addressed to this office, in compliance with your directions, enclosing certified copies of certain laws passed by the Cherokee national council, relating to furnishing ties and building material to said road, and also to the Missouri, Kansas and Texas railway.

Mr. Hillyer sets forth that the company, whose legal representative he is, being desirous of prosecuting without delay the construction of their road through the Cherokee country, he wishes to be informed what it will be necessary for the company to do in connection with this department in order to avail themselves of the provisions of the above-named laws.

In the opinion of this office, the same terms should be required of said last-named company, in the construction of their road through the Indian country, as were exacted of the Missouri, Kansas and Texas railway, in the exercise of the same privilege, as recommended in the letter of your predecessor to the President, of the 12th of July last; and I therefore respectfully recommend that the Atlantic and Pacific Railroad Co., before entering the Indian country in the construction of their line of road, be required to enter into bond of a reasonable amount, payable to the United States, or to either of the Indian nations through whose territory they may pass, conditioned that they shall in every particular respect the rights of said Indian

tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of this bureau.

The letter of Mr. Hillyer, together with the enclosures referred to, are herewith transmitted.

Very respectfully your obedient servant,

H. R. CLUM,
Acting Commissioner.

Hon. C. Delano, Secretary of the Interior.

94 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 7th*, 1871.

SIR: I have received your report of the 4th inst., accompanied by a letter from C. J. Hillyer, Esq., attorney of the Atlantic and Pacific Railroad Company, with its enclosures in regard to the company availing itself of the laws passed by the Cherokee national council, relating to furnishing ties and building material to said company.

You recommend that the same terms should be required of said company in the construction of their road through the Indian country as were exacted of the Missouri, Kansas and Texas Railway Co., in the exercise of the same privilege.

In reply I have to state that the law under which the Atlantic and Pacific railroad is being constructed provides specifically as to the manner of its construction and equipment. In the case of the Missouri, Kansas and Texas Railway Co. there were no such provisions; but, as the approval of the Executive was required for right of way through the Indian country, it was held that the Executive was authorized to prescribe the manner for its construction.

The Atlantic and Pacific Railroad Company will, therefore, in constructing their road through the Indian country, be required to comply substantially in all respects with the terms of the law and the standard adopted for the construction and equipment of the Pacific railroad.

The company will also be required, before entering the Indian Territory to give a bond of the same amount ($500,000) as that given by the M., K. & T. R. W. Co., "payable to the United States or to either of the Indian nations through whose territory they may pass, conditioned that they shall, in every particular, respect the rights of said Indian tribes and the individuals thereof, as guaranteed by the treaties and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes,
or individuals thereof, who may make sales of individual
95 property. Such contracts, whether with the nations or individuals to be valid only when approved by the proper officers of the Indian Department."

You will furnish the company with a copy of this letter, and require the bond to be filed in and approved by your office, and thereafter it will be submitted for my approval.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

The acting Com'r of Indian Affairs.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *March 15th*, 1871.

SIR: I have the honor to enclose herewith a bond bearing date the 13th instant, executed by the authorized representatives of the Atlantic and Pacific Railroad Company, in the penal sum of five hundred thousand dollars, conditioned for the protection of the rights of the several Indian tribes through whose territory the line of said road is designed to pass, in manner and form as stipulated in your letter to this office of the 7th instant.

It is believed that the bond in question is amply sufficient in its penalty, and sufficiently explicit in its conditions, to fully secure the Indian tribes in question, and the individual members thereof, in the possession and enjoyment of their rights, and I therefore approve the same and respectfully recommend that you concur in such approval.

Very respectfully, your obedient servant,

E. S. PARKER,
Commissioner.

Hon. C. Delano, Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 15th*, 1871.

SIR: I have the honor to submit herewith, for your action, a letter of the Commissioner of Indian Affairs, dated the 14th instant, and the accompanying contracts entered into between the Atlantic and Pacific Railroad Company and the Shawnee and Wyandotte Indians, relating to granting a right of way to said company
96 through the reserves of said Indians; also the bonds executed by said company for the faithful performance of the contracts.

The Commissioner of Indian Affairs states that these bonds and contracts are executed in conformity with instructions from his office, and he recommends their approval. These contracts and bonds secure the rights of said Indians, and are, therefore, respectfully submitted, with the recommendation that they be approved by you.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

To the President.

Endorsed as approved by the President, March 16th, 1871.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 16*th*, 1871.

SIR: I have received your letter of the 29th November last, and the accompanying map designating the route of the Atlantic and Pacific railroad from Neosho, in Missouri, to Prairie Summit, in the Indian Territory, a distance of about 27 miles.

In reply I have to state that the right of way having been secured by the company through the reserves of the Shawnee and Wyandotte Indians, and the map being found satisfactory, it is accepted as designating the route of your road between the points above mentioned.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Francis B. Hayes, Esq., pres't At. & Pac. R. R. Co., Washington, D. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 16*th*, 1871.

SIR: I transmit herewith, for your information, a copy of my letter of this date addressed to Francis B. Hayes, Esq., president of the Atlantic and Pacific Railroad Co., accepting the map
97 designating the route of his road from Neosho, in Missouri, to Prairie Summit, in the Indian Territory.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. E. S. Parker, Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 16*th*, 1871.

SIR: The President of the United States having approved the bonds and contracts given by the Atlantic and Pacific Railroad Company to secure the right of way through the reserves of the Shawnee and Wyandotte Indians, they are returned herewith, and also the other papers which accompanied your letter of the 14th inst.

Very respectfully, &c., C. DELANO, *Secretary.*

Hon. E. S. Parker, Commissioner Indian Affairs.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 16*th*, 1871.

SIR: I have received your letter of the 15th and the accompanying bond, executed by the Atlantic and Pacific Railroad Company, conditioned in the penal sum of $500,000 for the protection of the rights of the Indians through whose territory the road may pass.

You state that the bond is believed to be amply sufficient in all respects to secure the rights of the tribes and the individual members thereof, and that you have approved it and recommend my concurrence in such approval.

In reply I have to state, concurring with you as to the sufficiency of the bond to secure the rights of the Indians, I have endorsed my approval on the bond and return it herewith for filing.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. E. S. Parker, Commissioner of Indian Affairs.

98 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 16th*, 1871.

SIR: The President of the United States having approved the bonds and contracts given by the Atlantic and Pacific Railroad Company to secure the right of way through the reserves of the Shawnee and Wyandotte Indians, they are returned herewith, and also the other papers which accompanied your letter of the 14th inst.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. E. S. Parker, Commissioner of Indian Affairs.

Bond.

[1-dollar U. S. internal revenue conveyance stamp.]

Know all men by these presents, that the Atlantic and Pacific Railroad Company, a corporation organized under an act of Congress approved July 27th, 1866, is held and firmly bound by these presents unto the United States of America, in the penal sum of five hundred thousand dollars ($500,000) lawful money of the United States, for the payment of which sum well and truly the said corporation hereby binds itself, its successors, and assigns firmly by these presents.

Witness the signature and seal of said corporation affixed by the president and secretary of the same this 13th day of March, A. D. 1871.

The condition of this obligation is such that, whereas, the said corporation has been authorized by the act of Congress of July 27th, 1866, above referred to, to construct a railroad crossing the western border of the State of Missouri, and thence running westwardly through the Indian Territory by way of a point on the Canadian river to Albuquerque, in New Mexico, and thence to the Pacific ocean, and also a branch of the same from a point on the Canadian river eastwardly through a portion of said Territory to a point on the western border of Arkansas, at or near the town of Van Buren,

99 and has obtained the necessary consent of the several Indian tribes through whose reservations the said road and the said branch will pass, and also the approval of the same by the Secretary of the Interior.

Now, therefore, if the said corporation in constructing said road shall comply strictly with all the requirements and conditions prescribed in the said act of Congress in reference to the manner and character of its construction, and shall also in every particular re-

spect the rights of said Indian tribes and the individuals thereof, as guaranteed by the treaties and the intercourse and other statutes of the United States, and shall not commit any waste upon any Indian lands, nor take material therefrom, except under contract with said Indians, tribes, or individuals thereof, who may make sales of individual property, such contracts, whether with the nations or individuals to be valid only when approved by the proper officer of the Indian Department, then and in that event this obligation shall be null and void, but otherwise shall be and remain in full force and efficacy.

[SEAL.] ATLANTIC & PACIFIC R. R. CO.,
By FRANCIS B. HAYES, *President.*

WM. A. HAYES, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS,
BOSTON, *March 13th*, 1871.

There appeared William A. Hayes, personally known to me, and acknowledged that the above instrument signed by him as secretary was the free act and deed of the Atlantic and Pacific Railroad Company, before me.

C. W. LORING,
Commissioner U. S. Circuit Court
for the District of Massachusetts.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, Edmund F. Brown, United States commissioner for the District of Columbia, do hereby certify that Francis B. Hayes, president of the Atlantic and Pacific Railroad Company, personally appeared before me this day, in the county aforesaid, and acknowledged the foregoing instrument by him signed to be the act and deed of the said Atlantic and Pacific Railroad Company.

100

In testimony whereof I hereunto set my hand and affix my official seal at the city of Washington, this fifteenth day of March, A. D. 1871.

[SEAL.]

EDMUND F. BROWN,
United States Commissioner for the District of Columbia.

Approved:

E. PARKER,
Commissioner.

March 15th, 1871.

Approved:

C. DELANO.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *April 6th*, 1871.

Hon. J. M. Broadhead, 2d Compt., Treasury.

SIR: Enclosed I transmit for file in your office a bond, executed under date of the 13th ulto., by the lawful representative of the Atlantic and Pacific Railroad Company, conditioned in the penal sum of five hundred thousand dollars, payable to the United States, for the compliance by said company with all the requirements and conditions prescribed in an act of Congress approved July 27th, 1866, (by the terms of which said company was organized,) in reference to the manner and character of the construction of their road, and also in every particular to respect the rights of the Indian tribes, and the individuals thereof, through whose territory said road shall pass in the line of construction, as guaranteed by the treaties and intercourse and other statutes of the United States, and to refrain from the commission of any waste upon any of said Indian lands, and the taking of any material therefrom, except under contract with the said tribes or individual members thereof, who may make sales of individual property, such contracts to be valid only when approved by the proper officer of this department.

Very respectfully, your obedient servant,

H. R. CLUM,
Acting Commissioner.

101 PRESIDENT'S OFFICE A. & P. R. R. Co.,
BOSTON, *July 24th*, 1871.

The Honorable C. Delano, Secretary of the Interior, Washington, D. C.

SIR: I have the honor to inform you that the sourth section, of twenty-five miles in length, of the Atlantic and Pacific railroad, was fully completed on the 26th day of June last, and through you I respectfully request the President of the United States to appoint three commissioners, to examine this lately completed section of road under the provisions of the fourth section of the act of Congress of the United States, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

The construction of the last-named section of twenty-five miles of road completed the construction of one hundred miles in length of the Atlantic and Pacific railroad, under and in conformity with the provisions of the above-named act of Congress.

I am, very respectfully, your obedient servant,

FRANCIS B. HAYES,
Pres't A. & P. R. R.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *July* 31*st*, 1871.

GENTLEMEN: The president of the Atlantic and Pacific Railroad Company having notified me that the fourth section of 25 miles of their road and telegraph line, commencing at the termination of the first 75 miles, has been completed and is ready for the service contemplated by the act of Congress approved July 27th, 1866, you have been appointed by the President commissioners to examine and report upon the same. This appointment is conferred upon you believing that you have no interest in the company, and that you have no bias for or against it. In case you are qualified and accept the appointment, it will take effect from and after its acceptance by you and your subscribing to the oath of office, form herewith.

102 You will immediately advise me of acceptance, enclosing the oath of office, duly executed. It requires three commissioners to make the examination and sign the report, so that if either of you cannot serve the others will not be authorized to act until advised of the appointment of another commissioner to fill the vacancy.

The fifth section of said act provides "that said Atlantic and Pacific railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all the appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron, and a uniform gauge shall be established throughout the entire length of the road, and there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line."

You will be guided in the discharge of your duties as commissioners by the "circular of instructions for the examination of railroads," (copy herewith,) dated April 28th, 1871. You will also report whether said 25 miles, or any part thereof, have been constructed "on the line of any other railroad route, to aid in the construction of which lands have heretofore (prior to July 27th, 1866), been granted by the United States." Your report must be verified under oath, which may be taken before a U. S. commissioner, a clerk of a court, or a notary public. With your report you will forward a map and profile of the section; the map to be certified by the chief engineer of the company, as required on the first 75 miles.

The 21st section of the act fixes your compensation at $10 per day for each and every day actually and necessarily employed, and ten cents per mile for each mile actually and necessarily travelled in discharging the duties required of you, which *per diem* and mileage shall be in full compensation of your services, and to be paid by the company. Duplicates of the receipts given by you to the company on payment thereof will be transmitted with your report, which will be addressed to the Secretary of the Interior.

103 The commission will meet at Springfield, Missouri, as soon after the receipt hereof and acceptance as may be convenient.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Gen. G. M. Dodge, Council Bluffs, Iowa; R. I. McElhaney, Esq., Springfield, Mo.; Dr. J. Dunbar, Steubenville, Ohio, commissioners on Atlantic and Pacific railroad.

WASHINGTON, D. C., *Nov. 29th*, 1871.

Hon. Columbus Delano, Secretary of the Interior.

SIR: I enclose herewith two plats of portions of the route of the Atlantic and Pacific Railroad Co., the first showing the definite location of the main line of said road from the western boundary of the State of Missouri to the mouth of Kingfisher creek, in the Indian Territory, and the second showing definite location of the branch line from at or near Van Buren, on the western boundary of Arkansas, to a point in the Indian Territory on the Canadian river, near the 96th meridian.

I respectfully ask that said maps be filed in your department as plats definitely fixing the route to the extent therein shown of the main and branch lines of the road of said company, in accordance with the 3d section of the act of July 27th, 1866, by which said company was incorporated.

Very respectfully, your obedient servant,

C. J. HILLYER,

Attorney for the Atlantic and Pacific Railroad Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 1st*, 1871.

SIR: I transmit herewith, for appropriate action, two maps of portions of the route of the Atlantic and Pacific railroad, one showing the definite location of the main line of said road from the western boundary line of Missouri to the mouth of Kingfisher creek, in the Indian Territory, and the other showing the definite location of the branch line from at or near Van Buren, on the western
104 boundary of Arkansas, to a point in said Indian Territory, on the Canadian river, near the 96th meridian.

I also send a copy of the letter of the 29th ult., from C. J. Hillyer, Esq., agent, transmitting said map to this office.

Very respectfully, your obedient servant,

B. R. COWEN,

Acting Secretary..

Hon. Willis Drummond, Com'r of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 1st*, 1871.

SIR: I am in receipt of your letter of the 29th ult., transmitting two maps of portions of the route of the Atlantic and Pacific railroad, one showing the definite location of the main line of said road

from the western boundary of Missouri to the mouth of Kingfisher creek, in the Indian Territory, and the other showing the definite location of the branch line from at or near Van Buren, on the western boundary of Arkansas, to a point in said Indian Territory, on the Canadian river, near the 96th meridian.

Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

C. J. Hillyer, Esq., agent of the Co., Washington, D. C.

GENERAL OFFICE A. & P. R. R. Co.,
ST. LOUIS, *Dec. 3d*, 1871.

C. J. Hillyer, Esq.

DEAR SIR: The Missouri, Kansas and Texas Railroad Company, composed of the "Union Pacific Railroad Company, Southern branch," (a corporation organized under an act of the State of Kansas,) and the "Tebo and Neosho Railroad Company," (organized under the laws of Missouri.) and which succeeds to all the rights of each of said companies, including a grant of lands made by an act of Congress, entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph," &c., approved July
105 26th, 1866, (14 Stat., 289,) and by the 9th section of act, entitled "An act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley railroad and its extension to Red river," approved July 25th, 1866, (14 Stat., 236.) By the provisions of the 11th section of the act last mentioned the Union Pacific Southern Branch Company was to have the grant made by the 9th section, if it constructed its road to the southern boundary of Kansas before the Kansas and Neosho Valley Company constructed its road to that line. You will remember that that question was sharply contested between those companies one year ago last summer before the Secretary of the Interior, and that he decided in favor of the Southern Branch Company, and hence its successor, the "Missouri, Kansas and Texas Company," is entitled to that grant.

By the first part of the 11th section of the last-mentioned act that company is under obligation to permit any railroad company chartered or subsidized by Congress to "connect, unite and consolidate" with its road. And is prohibited from charging "any road authorized to connect as aforesaid," * * * "a greater tariff per mile for freight or passengers than is charged per mile for the same by its own road." The road of the company crosses the Atlantic and Pacific railroad at Venita, in the Indian Territory, about forty miles west of the western boundary of Missouri.

In direct violation of the provisions of the said eleventh section of the act above quoted, and of the eleventh section of the act of July 26th, 1866, first above referred to, the M., K. & T. Co. have refused, and do still refuse, to permit the Atlantic and Pacific Company to make connection with their road, and refuse to stop their

trains at the crossing for the delivery or reception of freight or passengers, but constantly run all their trains rapidly past the place of crossing without stopping there. Such conduct on their part has the effect of prohibiting the people along the line of the Atlantic and Pacific road in Missouri from availing themselves of the excellent market afforded in Texas, southwestern Arkansas, and the Indian country, for the large surplus of bacon, flour, fruit, &c., they now have on hand, as well as depriving the people of those sections of the advantage of purchasing their needed supplies of pro-
106 duce in the nearest and cheapest market. It also prevents the people along the line of the M., K. & T. R. R. in Kansas traffic-ing with the people of Missouri, along the line of the Atlantic and Pacific railroad.

The M., K. & T. Co. have recently had commissioners appointed to examine their road from the southern line of Kansas, south, who will soon be called upon to examine and report on it.

Will you please strongly urge the Secretary of the Interior to instruct the commissioners to examine and report as to whether that company have and do comply with those provisions of the law requiring it to permit companies incorporated or subsidized by Congress to connect their roads with its road, and whether it charges "any road authorized to connect," as aforesaid, "a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road."

This matter is of great importance to our company, and it is desirable that you secure such instructions, if it is possible, and after the commissioners have reported, you could induce the Secretary of the Interior to refuse to give that company its lands until it shall give bond that it will receive and discharge freight and passengers at the place of crossing, and carry them at the same rate per mile it charges for the same service on its own road.

Yours truly, JAMES BAKER,
Attorney for A. & P. R. R. Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 4th*, 1871.

SIR: I have the honor to submit herewith, for your action, the reports dated "November 16th, 1871," of the commissioners, Messrs. G. M. Dodge, R. I. McElhaney and J. Dunbar, appointed by you to examine and report upon the 4th and 5th sections, of 25 miles each, of the road and telegraph line of the Atlantic and Pacific Railroad Co., "commencing at station 10180 in the southeast quarter sec. 23, t'p 25, R. 22, in the State of Missouri, and ending at station 12805—25—1.54 miles west of the crossing of the Missouri Kansas and Texas railroad."

107 The commissioners in their reports represent that these sections of road are constructed in a substantial and workmanlike manner, ballasted throughout, and were completed, the fourth on the 18th of June, 1871, and the 5th on the 6th of October, 1871; and that the telegraph line for this distance is also completed in first-class manner. The rails are of American manufact-

ure, and weigh 56 pounds to the yard, with a uniform gauge of 4 feet 8½ inches throughout the entire length of this 50 miles, making a road of the first class, and fully competent to transact all business. Also that they are informed by officers of the company that the 4th section is built substantially upon the line of the South Pacific railroad, which had a grant of *line* from the United States prior to July 27th, 1866. They say of the 5th section, that no part of it is constructed on the line of any other railroad route, to aid in the construction of which lands had been granted by the United States prior to the date last above mentioned.

I therefore respectfully recommend the acceptance of said 50 miles of road and telegraph line, and the issue to the company of patents for the lands due on account of the construction thereof, agreeably to the provisions of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

To the President.

(Endorsed.)

EXECUTIVE MANSION, *December 6th*, 1871.

The within recommendations of the Secretary of the Interior are approved, and he will give the necessary instructions to carry them into effect.

U. S. GRANT.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 8th*, 1871.

SIR: I transmit herewith, for appropriate action, the maps
108 of the 4th and 5th sections, of 25 miles each, of the completed portion of the Atlantic and Pacific railroad, commencing at station 10180 in the S. E. ¼ of sec. 23, t'p 25, R. 22, in the State of Missouri, and ending at station 12805—25—1.54 miles west of the crossing of the M., K. & T. railroad.

I also send a copy of the letter of the 4th inst., from this department to the President of the United States, recommending the acceptance of the said 50 miles, and of the President's endorsement thereon, dated the 6th instant.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Com'r of the General Land Office.

WASHINGTON, *Dec. 9th*, 1871.

Hon. Columbus Delano, Secretary of the Interior.

SIR: On behalf of the Atlantic and Pacific Railroad Company, I beg leave to file with your department a communication, herewith

enclosed, respecting the refusal of the Missouri, Kansas and Texas Railroad Company to connect with the Atlantic and Pacific Railroad Company at the junction of said roads at Venita, in Indian Territory, and to ask the consideration of the subject as therein requested.

Very respectfully, your obedient servant,

C. J. HILLYER,
Att'y for A. & P. R. R. Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec. 11th*, 1871.

SIR: I have received your letter of the 9th instant, enclosing one addressed to you on the 3d instant by James Baker, of St. Louis, Missouri, attorney of the Atlantic and Pacific Railroad Company, containing complaints against the Missouri, Kansas and Texas Railroad Company, in relation to the connection of the two roads at Venita, Indian Territory, and in reply have to say that the commissioners appointed to examine said Missouri, Kansas and
109 Texas road, in said Territory, will be instructed to inquire into the truth of these allegations, and report the result to this department.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

C. J. Hillyer, Esq., attorney for the Atlantic and Pacific Railroad Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Jan. 13th*, 1872.

GENTLEMEN: In reply to the inquiries contained in your letter of the 8th instant, I have to inform you that the only map filed by the Missouri, Kansas and Texas Railway Company in the Department since the date of my letter to you of 27th May last, is one showing the completion of their main line from the southern boundary of Kansas to the Arkansas river, a distance of 86.75 miles. It accompanied the report of the commissioners appointed by the President to examine said completed road, on which report no action has yet been taken.

The Atlantic and Pacific Railroad Company have filed a map of the definite location of their main line from the western boundary of Missouri to Kingfisher creek, in the Indian Territory, and a map of the definite location of their branch line from the western boundary of Arkansas, at or near Van Buren, to a point on the Canadian river near the 96th degree of longitude, in the Indian Territory. Commissioners have examined the main line to a point in said Territory 1.54 miles west of its intersection with the Missouri, Kansas and Texas railroad, have reported it as completed, and their report has been accepted by the President.

After a careful reading of your letter I am in some doubt as to what the records of the department are of which you wish to be furnished with copies. Copies of maps will be furnished by the

Commissioner of the General Land Office on compliance with the terms and usages in such cases.

Very respectfully, etc.,

C. DELANO, *Secretary.*

Messrs. W. P. Ross, W. P. Adair, C. N. Vaun, Cherokee delegation.

110 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Feb. 6th*, 1872.

SIR: I transmit herewith, for appropriate action, three maps of the Atlantic and Pacific railroad, designating portions of the line of said road, as follows:

1st. Map of the main line, between the mouth of Kingfisher creek, in the Indian Territory, and the eastern boundary line of New Mexico.

2d. One of the branch line, from a point on Canadian river (near 96th meridian), in Indian Territory, to intersection of said branch with main line; and,

3d. Duplicate of the map of a portion of the branch line (heretofore filed), being a substitute for the one previously filed.

These maps were received, with a letter of the 3d instant, from C. J. Hillyer, Esq., attorney for the company.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Commissioner G. L. O.

And on the same date Secretary acknowledged receipt of same to Hillyer.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *March 11th*, 1872.

GENTLEMEN: In reply to your communication of the 2d instant, you are informed that the Atlantic and Pacific Railroad Company is the only company authorized by law to construct a railroad through Indian Territory entering from the east. That said company has its road already in process of construction, and that the line of route as exhibited by the map thereof, filed with the Hon. Secretary of the Interior, shows that the same is contemplated to pass through the northwestern part of the Creek country.

Very respectfully, your obedient servant,

F. A. WALKER,
Commissioner.

Messrs. Jno. R. Moore, D. N. McIntosh, and Pleasant Porter, Creek delegates, Washington, D. C.

111 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 11th*, 1872.

SIR: In answer to the request contained in your letter of the 6th instant, I have to state that the maps filed at different dates by the

Atlantic and Pacific Railroad Company, showing the route of the main line of their road through the Indian Territory, northern Texas, New Mexico, Arizona, and portions of California, to San Francisco, have been examined and approved, and the lands along the line indicated by the maps will, so far as they are public lands, be withdrawn as soon as the necessary maps therefor can be completed in the General Land Office.

The route to San Francisco, as delineated on the map filed, appears to me to be sanctioned by the terms of the charter of the company, and there is no doubt of their right to construct the road on that line.

I am, sir, very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

Francis B. Hayes, Esq., president of the A. & P. R. R. Co., present.

WASHINGTON, D. C., *April 13th*, 1872.

Hon. C. Delano, Secretary of the Interior.

SIR: In the communication from your department addressed to Mr. Hayes, president of the Atlantic and Pacific Railroad Company, approving the route selected by said company, I observe that the approval is confined to the route of the main line, and that no mention is made of the branch line in the Indian Territory, from a point on the Canadian river to the town of Van Buren, Arkansas. The maps showing the location of this line are on file in the General Land Office. We see no reason why this approval should not extend to this branch line.

It is true that the treaties of 1866 with the Indian tribes occupying this Territory did not expressly authorize the building of more than one main line from east to west. But this omission does not certainly prevent the operation of the subsequent positive enactment by Congress in the act of July 27th, 1866. The language is:

"The said company shall have the right to construct a branch
112 from the point at which their road strikes the river eastwardly along the most suitable route as selected to a point on the western boundary line of Arkansas, at or near the town of Van Buren." (14 Stat. at Large, p. 293.) The power of Congress to legislate for this Territory without regard to previous treaty stipulations has been fully settled by the Supreme Court. (See case of Cherokee Tobacco, 11 Wallace, p. 616.) The action of Congress in the premises is binding upon the courts and upon every other department of the Government.

Having designated on our maps now on file a line in conformity to the provisions of the act of Congress and so far as we know otherwise unobjectionable, I respectfully ask on behalf of the company that this portion of the line be approved and the lands appurtenant thereto withdrawn so far as they are public lands.

I am, very respectfully, your obedient servant,

C. J. HILLYER,
Att'y for A. & P. R. R. Co.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 16th*, 1872.

SIR: I transmit herewith, for your information, copies of letters of 10th and 11th inst., to Francis B. Hayes, Esq., president of the Atlantic and Pacific Railroad Co., relative to the withdrawal of lands for said road, in compliance with law, and the construction of certain sections of the act of incorporation.

Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

Hon. Willis Drummond, Com'r of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 20th*, 1872.

SIR: I have considered the request contained in your letter of the 13th inst., that the map filed by the Atlantic and Pacific Railroad Co., showing the route of their branch line, from the point at which the main line strikes the Canadian river, in the Indian Territory, eastwardly to a point on the western boundary of Ar-
113 kansas, at or near the town of Van Buren, be approved by the department, and the public lands on the line thereof be withdrawn.

The act organizing said company, in terms authorizes and empowers them to build said branch as well as the main line, and I find that Mr. Secretary Cox, in his letter to the President, of May 21st, 1870, expressly recognizes this right, and his views and findings were approved by the President on the 23d of the same month.

The map of said branch road is therefore approved, and the public lands along the line thereof will be withdrawn.

I am, sir, very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

C. J. Hillyer, Esq., attorney for A. & P. R. R. Co., Washington, D. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 20th*, 1872.

SIR: I transmit herewith, for your information and guidance, a copy of a letter of the 13th inst., from C. J. Hillyer, Esq., attorney for the Atlantic and Pacific Railroad Co., relative to a branch of said company's road, &c., and a copy of my reply thereto of this date.

Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

Hon. Willis Drummond, Com'r of the General Land Office.

Similar copy sent Commissioner Indian Affairs, May 14th, 1872.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 13th*, 1872.

GENTLEMEN: In reply to the inquiries contained in your letter of the 10th instant, in relation to railroads in the Indian Territory, I have to state:

1st. That as to the right of the Missouri, Kansas and Texas Railroad Company to build a branch line to Fort Smith, Arkan-
114 sas, no action has been taken since the departmental letter of 7th March last, to the president of said company, a copy of which accompanies your letter.

2d. The right of the Atlantic and Pacific Railroad Company to construct their branch line to Van Buren, Arkansas, was recognized by the department on the 20th ultimo, in a letter addressed to the attorney of the company. (Copy herewith.)

Very respectfully, your obedient servant.

B. R. COWEN,
Acting Secretary.

Messrs. W. P. Ross, W. P. Adair, C. N. Vaun, Creek delegation, Washington, D. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 16th*, 1872.

GENTLEMEN: I have received your letter of the 14th instant, containing the three following inquires concerning the branch line of the Atlantic and Pacific Railroad Company:

"1st. Does any portion of said branch road run through any part of the Cherokee country?

"2d. As the country designated lies altogether within the Indian Territory, we would ask where are the public lands thus withdrawn?

"3d. In case no portion of the line of said branch road runs through the Cherokee country, would any portion of the grant contemplated by its charter extend into the Cherokee lands or country, in case the same were public lands?"

In reply I have to state—

1st. That the line of said branch road, as laid down on the map filed in the department, passes through the extreme southern portion of the eastern part of the Cherokee country, being on the north bank of the Canadian river to its junction with the Arkansas, and thereafter on the north bank of the Arkansas to Van Buren.

2d. The public lands directed to be withdrawn are in the State of Arkansas exclusively, and embrace a few tracts only.

115 3d. The answer to the first inquiry obviates the necessity of an answer to the third.

Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

Messrs. W. P. Ross, W. P. Adair, C. N. Vaun, Cherokee delegation.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 10th*, 1872.

SIR: I am in receipt of your letter of the 8th inst., in which you ask for a construction of the 8th and 9th sections of the act of 27th July, 1866, incorporating the Atlantic and Pacific Railroad Company.

I have considered the subject referred to, and am of opinion that your company was allowed to commence the work on its road at any time within two years from the passage of the act, but was required to commence within that time; that such commencement on the 27th of July, 1868, would be a compliance with the law; that the amount of road to be constructed within the two years next succeeding the 27th of July, 1868, was left optional with the company, but that after the expiration of said two years, which would be after the 27th of July, 1870, you were required to build not less than 50 miles per year.

I think you may build more than 50 miles per year, and that the excess may properly be credited on the work required for the succeeding year or years. For example: If you had built 100 miles in the year commencing July 27th, 1870, you would not have been required to construct any road within the year commencing 27th July, 1871.

The 9th section does practically enlarge your period of performance for one year, and does not impose any consequences unless the breach has continued "for upwards of one year." A breach continuing for less than a year, or for just one year, would not subject the company to the right of the United States to "do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." Nevertheless the company will doubtless consult their own interests by carefully taking care that the breach does not continue for the period of one year.

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Very respectfully, your obedient servant,

B. R. COWEN,
Acting Secretary.

Francis B. Hayes, Esq., president of the company, Boston, Mass.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June 14th*, 1872.

Hon. Jas. Harlan:

I have received your letter of the 10th instant, suggesting the propriety of advising the Atlantic and Pacific Railroad Company to suspend work in the Indian Territory during the current year, on account of the deleterious influence on the wild tribes of Indians recently gathered from the plains and located in the western part of said Territory, that would be exerted by the introduction among them of thousands of laborers beyond the usual restraints of civilized life.

In reply, I have the honor to state that the act of 27th July, 1866, incorporating said company, provides in the 8th section thereof,

that said company shall complete not less than 50 miles of their road per year after the second year. The act seems to be silent as to the precise portion of the road on which this quantity shall be constructed each year, apparently leaving this to the discretion of the company, subject to the limitation of time as to the completion of the main line of the whole road.

The Commissioner of Indian Affairs informs me that the present terminus of said road in said Territory is more than 200 miles from the location of the before-mentioned Indians, and he sees no reason in the interest of the Indian service why the company should not proceed to construct their road during the current year to the full extent required by their charter.

Under these circumstances I should not feel authorized by law to advise suspension of the work on that road as suggested by you.

Very respectfully, your obedient servant,

C. DELANO.

Copy of Harlan's letter and Secretary's reply sent president of company 15th of June, 1872.

117 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 23*d*, 1881.

E. F. Winslow, Esq., vice-president Atlantic and Pacific Railroad Company, Drexel building, cor. Wall and Broad streets, New York city.

SIR: I am in receipt of your letter of 15th instant, stating that your financial agents, Messrs. Seligman and Co., desire "an official statement of the number of acres of land to which the Atlantic and Pacific Railroad Company will be entitled upon completion of its road from the west boundary line of Missouri to San Francisco."

The grant was made by the act of July 27th, 1866. (14 Stats., p. 292.) The amount of land granted is twenty sections per mile on each side of the road where the same passes through Territories, and ten sections per mile on each side where the line passes through States containing public lands; that is, forty sections per mile in the Territories and twenty sections per mile in the States. The grant is of the alternate odd-numbered sections. Had none of the land in the granted limits been disposed of prior to the grant, it could be satisfied within lateral limits of forty miles on each side of the road in the Territories, and like limits of twenty miles on each side in the States.

Where any of the lands in the "granted" limits, as above described, are otherwise disposed of, the act provides for "indemnity," to be taken from odd sections not more than ten miles beyond the "granted" limits. There are thus reserved for the purposes of the grant, and out of which it may be satisfied, the unappropriated odd-numbered sections within lateral limits of thirty miles on each side of the road in the States through which it runs and which embrace Government lands, and within fifty miles on each side in the Territories, to which the grant may be held to apply.

The grant is for a road from a point at or near Springfield, Missouri, to the Pacific, with a branch from the point at which it strikes the Canadian river to a point at or near Van Buren, Arkansas.

The main line as located, starting at Springfield, Missouri, runs to San Francisco, California, an approximate distance of 2,126 miles.

The branch line, as located, runs from a point on the Cana-
118 dian river, in the Indian Territory, to Van Buren, Arkansas, approximately 300 miles.

On the main line, from Springfield the road is constructed to Venita, in the Indian Territory, 89 miles being in the State of Missouri. At ten sections per mile on each side of the road the amount of the grant in Missouri is 1,139,200 acres, approximately. The lands have been earned, and patents have issued for 504,385.15 acres. On this portion of the line there is but little land left subject to the grant, and the loss will have to be made up from the "indemnity" lands elsewhere.

From the west line of Missouri the main line enters the Indian Territory, and is located to the west line thereof, a distance of about 355 miles. Of the branch line about 295 miles are also in this Territory. No withdrawal of lands for the benefit of the grant has ever been made in this Territory, nor could there have been any, since there have never been and are not now any local land offices established; and the lands have never, in any manner, been subject to disposition under the general laws. Neither has there ever been any final decision of the question whether or not the lands in the Territory will pass under the terms of the grant to the company. Section 2 of the act making the grant provides for the right of way through the public lands; that the company may take from the adjacent public lands material for the construction of the road; prescribes the width for the right of way; exempts the right of way from taxation in the Territories, and said section closes as follows: "The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

The grant of lands is contained in the following section of the act, section 3. The Indian title in this Territory has not been extinguished, and I will not here undertake to express any opinion in advance of a decision of the question concerning the status of the lands. If it shall finally be determined that the lands in question inure to the grant, the amount thereof in said Territory would be about 16,640,000 acres.

119 From the west line of the Indian Territory the main line runs through the northern portion of Texas about 200 miles to the west line thereof. There are no Government lands in that State, and hence no grant of lands by the United States.

From the west line of Texas the main line, as located, runs through the Territory of New Mexico, about 416 miles, to the east line of Arizona Territory, and thence through Arizona, about 380 miles, to the west line thereof.

Through these Territories the amount of the grant is about 20,377,600 acres. The land is for the greater part unsurveyed, and I see no reason why, out of the land reserved for the grant, the same may not be entirely satisfied as to this part of the line and yet have a very large quantity in the "i-demnity" limits applicable to losses elsewhere.

From the west line of Arizona the located main line enters California, and runs to the coast at or near San Buenaventura, and thence, on a line more or less near the coast, to San Francisco, a distance of about 686 miles. Were the grant "full" in California, the amount would be about 8,780,800 acres.

This amount would be reduced to a considerable extent by the proximity of the line, in places, to the coast; but the deficiency may be satisfied by selections in "i-demnity" limits anywhere along the line where i-demnity can be found.

About five miles of the located branch line are in Arkansas. The amount of the grant for that portion would be about 64,000 acres, of which there would probably be available for the purposes of the grant about one-half in the "granted" limits.

Tabulated, were the grant full throughout, the figures would be as follows, estimated:

Location.	Miles.	Grant per mile.	Total grant.
		Acres.	*Acres.*
Missouri, main line	89	12,800	1,139,200
Indian T'y, main line.....	355	25,600	9,088,000
Texas (no grant) main line..	200		
New Mexico T'y " " ..	416	25,600	10,649,600
Arizona T'y " " ..	380	25,600	9,728,000
California, " " ..	686	12,800	8,780,800
Indian T'y, branch line	295	25,600	7,552,000
Arkansas, " "	5	12,800	64,000
Total	2,426	.....	47,001,600

120 From the amount of the grant, as above, there should be deducted for deficiencies in area within the limits of the same, say 7,001,600 acres, leaving in round numbers the area of the grant 40,000,000 acres. Of that amount there will be lost, by reason of valid interfering claims, reservations, &c., a very considerable portion. But to make good such losses there will remain the lands in the "indemnity" limits; that is, the lands in odd-numbered sections embraced within a strip ten miles wide on each side of the "granted" limits for the whole distance to which the grant extends, excepting that part of the line which lies so near the sea as to exclude the "indemnity" limits on the side next to the sea.

Were the limits full along the entire line, on the basis of the above

estimate, the "indemnity" lands would aggregate more than 14,000,000 acres. Of course a portion of the "indemnity" lands would be excepted, by prior claims, from any operation of the grant; but in my opinion enough would remain to equal the losses in the "granted" limits.

I reiterate that this estimate is not to be taken as an expression of opinion that lands in the Indian Territory will inure to the grant, but is subject to the decision of that question by competent authority.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October 30th*, 1880.

GENTLEMEN: Application having been made by the vice-president of the Atlantic and Pacific Railroad Co. for the examination by commissioners of fifty-two (52) miles of the completed line of said company's road, commencing at Albuquerque, New Mexico, and ending at a point fifty-two (52) miles therefrom, you have been appointed by the President of the United States commissioners to examine and report upon the same.

The appointment is made upon condition that you have neither directly nor indirectly any interest in this corporation, nor any connection with or bias for or against it which would interfere with an impartial performance of the duties imposed upon you. Three commissioners are required to make the examination and
121 sign the report; therefore, if either should decline, the others will not be authorized to act until they are advised of the appointment of another person to fill the vacancy.

A map and profile of the road examined will be transmitted with your report. I enclose herewith forms of certificates to be made on such map and profile by the president and chief engineer of the company.

You will be guided in the discharge of your duties by the "circular of instructions for the examination of railroads," dated 28th of April, 1871 (copy herewith).

The president of the company will furnish you with his affidavit, showing the commencement, termination, and length of the road to be examined, and that it is completed as required by law and the instructions of this department. The affidavit will accompany your sworn report to the "Secretary of the Interior."

The 21st section of the act of 27th of July, 1866, (14 Statutes, 299), fixes your compensation at $10 per day for each day actually and necessarily employed, and 10 cents per mile for each mile actually and necessarily traveled in discharging the duties required of you, which *per diem* and mileage shall be in full compensation for your services, and must be paid by the company. Duplicates of the receipts given by you, on payment thereof, will be enclosed with the report.

On the reception by the department of your letters of acceptance

and oaths of office you will be ordered to proceed with the examination.

A copy of the President's order appointing you commissioners is herewith enclosed.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To Hoyt Sherman, of Des Moines, Iowa; J. E. Bloom, of New York, N. Y., and J. B. Nichols, of Philadelphia, Pa.

ALBUQUERQUE, NEW MEXICO, *Nov. 8th*, 1880.

To Hon. Carl Schurz, Secretary of the Interior, United States of America.

SIR: We, the undersigned, commissioners of the United
122 States, appointed to examine the sixth section of fifty (50) miles of the railroad and telegraph line of the Atlantic and Pacific Railroad Company, authorized by the fourth section of the act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, commencing at the junction with the New Mexico and Southern Pacific Railway Company's railroad, near Isleta, in township 8 north, range 2 east, in the Territory of New Mexico, ending at the termination of the fiftieth mile therefrom in a westerly direction, certify—

That we have carefully examined the said section, and that the alignment and grades are as represented on the accompanying map and profile, and are such, as in view of the capabilities of the ground, the Government should accept as fulfil-ing the requirements of law.

That in this distance (50 miles) there are—

31,200	feet of level line.				
18,316.5	"	grades	0 to 10	feet per mile.	
53,700	"	"	10 " 20	"	"
23,485.2	"	"	20 " 30	"	"
23,898.5	"	"	30 " 40	"	"
44,691.1	"	"	40 " 50	"	"
68,708.7	"	"	50 " 52.8	"	"
264,000	"	total.			

Maximum grade, 52.8 feet per mile.

That also in this distance (50 miles) there are—

214,123	feet of tangents.				
18,580.2	"	curves	0	to 1	degrees.
3,691.3	"	"	1	" 2	"
7,515.8	"	"	2	" 3	"
7,275.4	feet of curves		3	to 4	degrees.
3,613.8	"	"	4	" 5	"
7,477.8	"	"	5	" 6	"
—	"	"	6	" 7	"
7,477.8	"	"	7	" 8	"
264,090	"	total.			

Minimum radius, 716.8 feet.

That said section of fifty (50) miles is laid with steel rails, weighing fifty-six (56) pounds per linear yard, of American manufacture; that the *guage* of the road is four feet eight and one-half inches (4 ft. 8½ in.); that the joints are made with fish-plates, two (2) to each joint, and the rails fastened to each tie by four (4) spikes; that there are 2,816 ties to the mile generally, at least six (6) inches thick, eight (8) inches wide, and eight (8) feet long; that the ties are of oak, spruce, and pine, chiefly the latter, the sharper curves being wholly, and the lighter ones partially, laid with oak ties; that there are on the said fifty (50) miles seventy-six hundred feet of side track, located at convenient points and connected with the main track by substantial switches; that the excavations are in conformity with the requirements of law and the circular of instructions of the department.

123

That the embankments are generally in accordance with the aforesaid requirements, but very few being of scant width.

That the road is not ballasted. There being no material along the line suitable for that purpose, the track has been surfaced with the soil and sand found alongside the line.

That there are forty-two hundred and sixty (4,260) feet of pile bridges, and fifty-five wooden box culverts, the pile bridges being built in a substantial and workmanlike manner, and of good material.

There are no stone culverts on the said section of fifty (50) miles, no building stone being found until nearly the end of the section. It is the intention of the company to replace wooden culverts with stone where desirable, when renewal becomes necessary. A few of the pile bridges have temporary floors, which are being replaced with the permanent floors as fast as proper material is received therefor. The timber used in these bridges is pine and spruce.

That there are on the said section of fifty miles no station or shop buildings. No point has been reached as yet at which there is enough business to demand station accommodations. The company has, however, the materials on hand for several station buildings. The shop buildings and engine-house are to be located on the east side of the Rio Grande del Norte, about twelve miles from

the eastern end of the said fifty miles, the track of the New
124 Mexico and Southern Pacific Company to be temporarily used to reach them. A beginning has already been made on these buildings.

That there is, near the junction with the New Mexico and Southern Pacific railroad, a frost-proof tank and a wind-mill of approved pattern, and near the thirtieth mile a temporary tank supplied by a permanent steam pump, the permanent tank to be put up as soon as the material for it arrives.

A telegraph line has been constructed and is in operation for a distance of forty-seven and one-half (47½) miles. The line is complete to the fortieth mile, but beyond that point requires several days' work to finish it in a thorough manner. The line is constructed with spruce poles, twenty-six (26) to the mile, and No. 9 galvanized wire, insulated with glass insulators attached to cross-arms. The material is on the ground to finish the line and nearly all in place. That there are in use on the said section, fifty (50) miles, the following rolling stock, viz:

3 locomotives.
2 passenger coaches.
1 combination coach and baggage car.
2 baggage, mail and express cars.
29 box cars.
122 flat cars, and several hand cars.

We attach to this report an official statement of the treasurer of the company, showing the amount of rolling stock that has been contracted for for the use of the road. The said section of fifty (50) miles passes through a country inhabited only by Indians, and there is as yet no commercial business.

The road is built in a workmanlike and creditable manner, and we recommend that the said section of fifty (50) miles of railroad and telegraph be accepted.

Respectfully submitted.

HOYT SHERMAN.
J. E. BLOOM.
A. B. NICHOLS.

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } *ss:*

On this eighth day of November, A. D. 1880, personally
125 came before me, the undersigned, a notary public, and under oath declared that the foregoing report signed by the said Hoyt Sherman, J. E. Bloom, and A. B. Nichols, is true and correct as they verily believe.

MELCHOIR WERNER,
[SEAL.] *Notary Public, County of Bernalillo.*

I, S. W. Reynolds, treasurer of the Atlantic and Pacific Railroad Company, do hereby certify that contracts have been made for rolling stock for this company as follows, viz:

St. Charles Manufacturing Co.

30 box cars, delivered.
25 " " to commence last of October.
50 " " 25 in December and 25 in January.
150 flat " delivered.
50 " " to commence last of October.
200 " " 75 in November, 75 in December, 50 in Jan.
25 coal " to commence last of October.

W. C. Allison & Co.

50 flat cars during November.

Gill Car Manufacturing Co.

44 box cars, delivered.

Osgood Bradley.

4 passenger cars, delivered.
3 combination smoking and baggage cars, delivered.

Jackson & Sharpe.

2 baggage, mail, and express cars, delivered.

Ohio Falls Car Co.

3 caboose cars, to be delivered in October.

Baldwin locomotive works.

1 locomotive, 15 x 24 cylinder, 8 wheels, 4 coupled drivers, 60¾ sec., which has been shipped and received.
4 locomotives, 16 x 24 cylinder, 8 wheels, 4 coupled drivers, 60 sec., to be delivered, one in November and three in December, 1880.

Manchester locomotive works.

1 locomotive, shipped and received.

126 Hinkley locomotive works.

1 locomotive, 16 x 24 cylinder, which has been shipped and received.

Taunton locomotive works.

6 locomotives, delivered, two in December and four in January.

Rhode Island locomotive works.

5 locomotives, delivery to commence in January, 1881.

[COMPANY SEAL.] S. W. REYNOLDS, *Treasurer.*

Boston, November 2d, 1881.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 15th*, 1880.

SIR: I have the honor to submit herewith, for your consideration, the report of Messrs. Hoyt Sherman, J. E. Bloom, and A. B. Nichols, who were appointed by you commissioners to examine the 6th section of the railroad and telegraph line constructed by the Atlantic and Pacific Railroad Company.

Said section begins at a point in T. 8 N., R. 2 E., near Isleta, at the junction with the New Mexico and Southern Pacific railroad, runs westwardly, and ends at a point fifty miles from the place of beginning, all in the Territory of New Mexico.

The commissioners report said section to be built in "a workmanlike and creditable manner," and in substantial compliance with the law and the instructions of this department. I therefore recommend that said section be accepted by you, and the patents for lands earned by the construction thereof be issued to said company, pursuant to the 4th section of the act approved July 27th, 1866. (14 Stat., 295.)

Very respectfully, C. SCHURZ, *Secretary.*

To the President.

EXECUTIVE MANSION, *December 17th*, 1880.

The recommendations of the Secretary of the Interior herein are hereby approved.

R. R. HAYES.

127 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December 17th*, 1880.

The Commissioner of the General Land Office.

SIR: I enclose herewith copy of letter addressed to the President by me on the 15th instant, transmitting report of commissioners appointed by him to examine fifty miles of the Atlantic and Pacific railroad, lying immediately westward of the Rio Grande, at Isleta, New Mexico, and recommending that the section (sixth), be accepted, and that the lands earned by the construction thereof be issued to the Atlantic and Pacific Railroad Company, together with a copy of the President's endorsement thereon, approving the recommendations.

I also transmit herewith the map and profile of said section, which accompanied the report of the commissioners, that you may carry out the President's order.

Very respectfully, C. SCHURZ, *Secretary.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 16th*, 1881.

J. N. W. Rumple, Esq., Marengo, Iowa; Robert Bell, Esq., Mt. Carmel, Ill.; Henry Blackstone, Esq., Pittsburg, Penn.

GENTLEMEN: Application having been made by the president of the Atlantic and Pacific Railroad Company, for the examination, by

commissioners, of fifty miles of the completed line of said company's road, commencing at the fiftieth mile-post west of the junction with the New Mexico and Southern railroad, near Isleta, New Mexico, and ending at a point one hundred miles from said junction, you have been appointed by the President of the United States, commissioners to examine and report upon the same.

The appointment is made upon condition that you have neither directly nor indirectly any interest in this corporation, nor any connection with or bias for or against it which would interfere with an impartial performance of the duties imposed upon you. Three commissioners are required to make the examination and
128 sign the report; therefore, if either should decline, the others will not be authorized to act until they are advised of the appointment of another person to fill the vacancy.

A map and profile of the road examined will be transmitted with your report. I enclose herewith forms of certificates to be made on such map and profile by the president and chief engineer of the company.

You will be guided in the discharge of your duties by the "circular of instructions for the examination of railroad," dated 28th April, 1871 (copy herewith).

The president of the company will furnish you with his affidavit, showing the commencement, termination, and length of the road to be examined, and that it is completed as required by law and the instructions of this department. The affidavit will accompany your sworn report to the "Secretary of the Interior."

The 21st section of the act of 27th July, 1866, (14 Statutes 299,) fixes your compensation at $10 per day for each day actually and necessarily employed, and 10 cents per mile for each mile actually and necessarily traveled in discharging the duties required of you, which *per diem* and mileage shall be in full compensation for your services, and must be paid by the company. Duplicates of the receipts given by you, on payment thereof, will be enclosed with the report.

You will be ordered, on the reception by the department of your letters of acceptance and oaths of office, to proceed with the examination.

A copy of the President's order appointing you commissioners is herewith enclosed.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

ALBUQUERQUE, NEW MEXICO, *March 29th*, 1881.

To the Hon. J. S. Kirkwood, Secretary of the Interior, U. S. A.

SIR: We, the undersigned, commissioners of the United States, appointed to examine the third and fourth sections, Western division, of twenty-five miles each of the railroad and telegraph lines of the Atlantic and Pacific Railroad Company, authorized by the fourth section of the act of Congress, entitled An act granting lands
129 to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, approved July 27th, 1866, commencing at a point fifty miles west of

the junction with the New Mexico and Southern Pacific railroad, near Isleta, in township No. 8 north, range 2 east, in the Territory of New Mexico, and ending at the termination of the 100th mile from said junction, in a westerly direction, certify that we have carefully examined the two sections of twenty-five miles each, and that the alignment and grades are as represented on the accompanying map and profile, and are such as, in view of the capabilities of the ground, fulfill the requirement of the law.

That in this distance of 50 miles there are 38,750 feet of level line.

From	0 to 10	feet grades	27,388.7	feet.
"	11 " 20	" "	67,219.4	"
"	21 " 30	" "	51,186.6	"
"	31 " 40	" "	25,093.9	"
"	41 " 50	" "	17,400.0	"
"	51 " 52.8	" "	36,961.4	"
	Total		264,000.0	"

Alignment.

Curves.	*Angles.*	*Length.*	
0 to 1 deg	92 deg. 52 min	9,715	feet.
1 " 2 "	208 " 49 "	11,098	"
2 " 3 "	90 " 41 "	3,203	"
3 " 4 "	102 " 33 "	2,563.8	"
4 " 5 "	70 " 38 "	1,412.7	"
5 " 6 "	280 " .. "	4,704	"
6 " 7 "	50 " .. "	714	"
7 " 8 "	71 " 12 "	949	"
Total	966 deg. 46 min	34,359.5	feet

The ruling grades on curvatures are reduced .05 feet per 100 feet for each degree of curvature.

Bridges.

There are no Howe truss bridges, but all are pile bridges of various lengths, from 15 feet to 300 feet in length. Pile
130 bridges have been used entirely, excepting where there was solid rock; there framed bents are used, the sills bolted to the rock, the spans are 15 feet, and from 4 to 24 feet in height. Four piles have been driven in each bent of size not less than ten inches at the small end. The timber is of Michigan or northern and native pine. Where the grade line is as much as 20 feet above the bed of the stream, the piles are cut off and regular frame bents are erected. The caps and posts in all those structures are 12 x 12 inches; the stringers 7 x 16 inches, three on each side; cross-ties 6 x 8 in. by 9 ft.; guard-rails 5 x 6 inches. Said bridges are all built in a substantial and workmanlike manner.

Culverts.

There are on these two sections sixteen culverts, four of which are stone 3 x 4 feet, and twelve wooden box 1 x 2 and 1 x 4 feet, which are to be replaced by stone culverts as soon as it may be required.

Graduation.

The excavations are in conformity with the requirements of the law and the circular of instructions of the department. In solid rock they are from 16 to 18 feet at grade with a slope of 1 to 4, taken out one foot below grade, which is filled in with gravel. The earth excavation has been made at a width of 20 feet throughout the two sections.

Embankments.

The embankments are very generally in accordance with aforesaid requirements. We observed but one place where it was in scant width. The road is not ballasted with stone or gravel except at short distances, but is filled in between the ties with earth, there being no material along the line suitable for ballasting.

Cross-ties.

The cross-ties are of white oak and yellow pine, which are 8 feet long, and from 6 to 8 inches thick, and from 6 to 8 inches over face. There are 2,816 ties laid in track to each mile. In track-laying care has been taken in selecting large ties at the joints.

131 Rails and fastenings.

The said two sections, of 25 miles each, are laid with steel rails, weighing 56 pounds per lineal yard, and are of American manufacture. The gauge of the road is four feet eight and one-half inches (4 ft. 8½ in.), and joints secured with the Sampson fish-plate on each side, and rails fastened to each tie by four spikes.

Sidings.

There are five sidings on the said two sections, at—

Laguna,	53-mile post	1,600	feet.
Cubero,	59 " "	1,600	"
McCarty's,	72 " "	1,600	"
Grant's,	84 " "	1,600	"
Blue Water,	94 " "	1,600	"
Total		8,000	feet.

Depots.

There are no depots or freight-houses yet erected on these two sections.

Shops and engine-houses.

The engine-house (the one contemplated in last November's report) has been commenced, and the masonry of six stalls has been

commenced and will soon be completed, at the site spoken of in said report, on the east side of the River Rio Grande, at Albuquerque, and about 12 miles from the junction of the Atlantic and Pacific railroad with the Southern Pacific railroad. The capacity of said engine-house, when completed, will contain 30 stalls. Progress has been made in the erection of an engine-house at Cranes.

Telegraph.

A telegraph line has been constructed along these two sections, and telegraph offices erected at Grant's, McCarty's and Blue Water. These buildings are well and neatly constructed, and well calculated for the purpose designed.

Water stations.

132 There are four water stations now under construction on the line of the said two sections and will soon be completed. Said tanks or water stations being erected upon stone foundations and substantially built.

Rolling stock.

Said line is well provided with rolling stock, sufficient and to spare, to accommodate the traffic and convenient construction of said line, having increased the rolling stock since the report of the former commissioners, November last, as follows:

14 engines.
5 passenger cars.
145 box cars.
25 coal cars; making in all:
17 engines,
7 passenger cars,
2 baggage "
3 caboose "
174 box "
413 flat "
25 coal "

All of which are of superior build and in good condition.

Location.

Said section of fifty miles passes through a country but very sparsely inhabited, except by the Indians, and consequently but little local business is or will be transacted for some time to come, except in carrying freight to the military posts on and adjacent to its line, and to the mines that may be opened in the country through which the line will pass.

The general construction of these two sections has been done in a good and workmanlike manner, and the same reflects great credit

upon those having the work in charge, and we hereby recommend the same to you for your favorable consideration.

All of which is very respectfully submitted.

J. N. W. RUMPLE.
ROBERT BELL.
H. BLACKSTONE.

133 TERRITORY OF NEW MEXICO, *County of Bernalillo*, } ss:

On this 29th day of March, A. D. 1881, personally appeared before me the undersigned, a notary public, and under oath declared that the foregoing report, signed by the said J. N. W. Rumple, Robert Bell, and Henry Blackstone, is true and correct, as they verily believe.

Witness my hand and notarial seal the day and date last above written.

[SEAL.] MELCHOIR WERNER,
Notary Public, County of Bernalillo.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 15th*, 1881.

SIR: I have the honor to submit herewith, for your consideration, the report of Messrs. J. N. W. Rumple, Robert Bell, and H. Blackstone, who were appointed by you commissioners to examine two sections, of twenty-five miles each, of the Atlantic and Pacific railroad. These sections are known as sections three and four of the Western division of said road. They begin at a point fifty miles west of the junction of said road with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and end one hundred miles from said junction.

The commissioners report said sections as constructed in a good and workmanlike manner, and in substantial compliance with the requirements of law and the instructions of this department. I therefore recommend that said section of railroad and telegraph line be accepted, and that patents for the lands earned by their construction be issued to the Atlantic and Pacific Railroad Company, pursuant to section 4 of the act of 27th July, 1866. (14 Stat., 295.)

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To the President.

(Endorsement.)

EXECUTIVE MANSION, *April 18th*, 1881.

The within recommendations of the Secretary of the Interior are hereby approved.

JAMES A. GARFIELD.

134 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C. *April 19th*, 1881.

The Commissioner of the General Land Office.

SIR: I enclose herewith, for your information and appropriate action, copy of my letter of the 15th instant to the President, submitting the report of Messrs. Rumple, Bell, and Blackstone, who were appointed commissioners to examine 50 miles of the Atlantic and Pacific railroad, (3d and 4th sections, Western division,) with the President's endorsement thereon, approving my recommendations that the sections be accepted, and patents for lands earned by their construction issued.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

The map and profile of the sections are herewith.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *November 14th*, 1881.

GENTLEMEN: Application having been made by the president of the Atlantic and Pacific Railroad Company for the examination, by commissioners, of 100 miles of the completed line of said company's road, commencing at a point 100 miles west from the intersection of said company's road with New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and ending at a point one hundred miles from the place of beginning, you have been appointed by the President of the United States commissioners to examine and report upon the same.

The appointment is made upon condition that you have neither directly nor indirectly any interest in this corporation, nor any connection with or bias for or against it, which would interfere with an impartial performance of the duties imposed upon you. Three commissioners are required to make the examination and sign the report; therefore, if either should decline, the others will not be authorized to act until they are advised of the appointment of another person to fill the vacancy.

A map and profile of the road examined will be transmitted
135 with your report. I enclose herewith forms of certificates to be made on such map and profile by the president and chief engineer of the company.

You will be guided in the discharge of your duties by the "Circular of instructions for the examination of railroads," dated 28th April, 1871 (copy herewith.)

The president of the company will furnish you with his affidavit, showing the commencement, termination, and length of the road to be examined, and that it is completed as required by law and the instructions of this department. The affidavit will accompany your sworn report to the "Secretary of the Interior."

The 21st section of the act of 27th July, 1866, (14 Statutes, 299), fixes your compensation at $10 per day for each day actually and necessarily employed, and 10 cents per mile for each mile actually and necessarily traveled in discharging the duties required of you, which *per diem* and mileage shall be in full compensation for your

services, and must be paid by the company. Duplicates of the receipts given by you on payment thereof, will be enclosed with the report.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To R. D. Mussey, Esq., Washington, D. C.; E. C. Dean, Esq., Washington, D. C.; Simon Stevens, Esq., 61 Broadway, New York.

ALBUQUERQUE, NEW MEXICO, *Dec. 9th*, 1881.

To the President:

The undersigned, commissioners appointed to examine and report upon "one hundred miles of railroad constructed by the Atlantic and Pacific Railroad Company, under the provisions of the act of Congress of the United States, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July 27th, 1866, commencing at a point one hundred miles west from the intersection of said company's road with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and ending at a point one hundred miles westerly from the place of beginning"—have the honor to state that they entered upon their duties as
136 stated in their commission, and made a careful examination of the location of this specific one hundred miles and its grades and curves, its embankments and excavations, its mechanical structures, sidings, ballastings, cross-ties, rails, fastenings, rolling stock, buildings, and telegraph line, from which examination we certify, that the entire one hundred miles of railroad and telegraph line, comprising the 5th, 6th, 7th and 8th sections, of 25 miles each, of said road, have been completed in a good, substantial and workmanlike manner, as is in all respects required by said act of Congress; that the alignment and grades of said road are correctly represented on the accompanying maps and profiles of said four sections, and that we append hereto a detailed statement of said grades, alignment, bridges and culverts for each of said sections, and a recapitulation which embraces the entire 100 miles.

Location.

The location of the line for this one hundred (100) miles is up the valley of the San José, eighteen (18) miles to its source in Campbell's pass; thence crossing the Continental divide, through the above-named pass, at an elevation of 7,395 feet; thence down the valley of the Rio Puerco of the West 82 miles, the remaining distance to the (200th) two hundredth mile-post from the junction at Isleta.

Statement of Grades, Alignments, and Bridging on the Fifth 25 Miles of the Atlantic and Pacific Railroad, from the 101st to the 125th Mile, Inclusive.

Grades.

Grade per mile.	*Length in feet.*
Level	12,000.00
1 to 10 feet, inclusive	8,312.3
11 " 20 " "	8,559.7
21 " 30 " "	29,200.2
31 " 40 " "	20,455.6
41 " 50 " "	9,223.6
51 " 52.8 " "	44,048.8
Total	13,200.00

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Curvature.

	Angles.	*Length.*
0 to 1 deg., inclusive	35 deg. 13 min.	3,521.7
1 " 2 " "	96 " 26 "	4,821.7
2 " 3 " "	21 " 54 "	730.0
3 " 4 " "	52 " 02 "	1,325.8
4 " 5 " "	37 " 00 "	740.0
5 " 6 " "		
Total	243 deg. 35 min.	11,139.2

Bridges.

Pile.	*Trestle.*	*Boxes.*
885 linear feet	30 linear feet	5

Sidings.

19,900.0 feet.

Statement of Grades, Alignments, and Bridging on the Sixth 25 Miles of the Atlantic and Pacific Railroad, from the 126th to the 150th Mile, Inclusive.

Grades.

Grade per mile.	*Length in feet.*
Level	12,500.00
1 to 10 feet, inclusive	18,738.60
11 " 20 " "	26,500.00
21 " 30 " "	37,917.00
31 " 31.68 " "	42,344.40
Total	132,000.00

Curvature.

	Angle.	*Length.*
0 to 1 deg., inclusive	28 deg. 18 min.	2,980.0
1 " 2 " "	29 " 26 "	1,471.7
2 " 3 " "	46 " 36 "	1,553.4
3 " 4 " "	71 " 38 "	1,790.8
4 " 5 " "		
5 " 6 " "		
Total	175 deg. 58 min.	7,795.9

138 Bridges.

Pile.	*Trestle.*	*Boxes.*
1,980 linear feet	60 linear feet	3

Sidings.

4,800 feet.

Statement of Grades, Alignments, and Bridges on the Seventh 25 Miles of the Atlantic and Pacific Railroad, from the 151st to the 175th Mile, Inclusive.

Grades.

Grade per mile.	*Length in feet.*
Level	17,538.6
1 to 10 feet, inclusive	26,161.4
11 " 20 " "	29,300.0
21 " 30 " "	29,700.0
31 " 31.68 " "	
Total	132,000.0

Curvature.

0 to 1 deg., inclusive	43 deg. 29 min.	5,778.8
1 " 2 " "	70 " 59 "	3,694.0
2 " 3 " "	37 " 37 "	1,294.2
3 " 4 " "	"	
4 " 5 " "	"	
5 " 6 " "	"	
Total	152 deg. 05 min.	10,767.0

Bridges.

Pile.	*Trestle.*	*Boxes.*
1,725 linear feet	0	7

Sidings.

4,000 feet.

Statement of Alignments, Grades, and Bridges on the 8th 25 Miles of the Atlantic and Pacific Railroad, from the 176th to the 200th Mile, Inclusive.

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Grades.

Grade per mile.	*Length in feet.*
Level	16,061.4
1 to 10 feet, inclusive	19,738.6
11 " 20 " "	41,300.0
21 " 30 " "	21,700.0
31 " 31.68 " "	33,800.0
Total	132,000.00

Curvature.

	Angle.	*Length.*
0 to 1 deg. inclusive	30 deg. 47 min.	3,665.0
1 " 2 " "	43 " 52 "	2,285.7
2 " 3 " "	92 " 55 "	3,252.3
3 " 4 " "	41 " 01 "	1,025.4
4 " 5 " "		
5 " 6 " "	163 " 28 "	2,724.4
Total	375 deg. 03 min.	12,952.8

Bridges.

Pile.	*Trestle.*	*Boxes.*
2,190 linear feet	0	15

Sidings.

3,200 feet.

Recapitulation of Grades, Alignments, Bridges, and Sidings on the Second 100 Miles of the Atlantic and Pacific Railroad, from the 101st to the 200th Mile, Inclusive.

Grades.

Grade per mile.	*Feet.*	*Miles.*
Level	58,300.00	11.041
1 to 10 feet, inclusive	72,950.90	13.816
11 " 20 " "	105,659.70	20.011
21 " 30 " "	111,517.00	21.121
31 " 40 " "	126,300.00	23.921
41 " 50 " "	9,223.60	1.747
51 " 52.8 " "	44,048.80	8.343
Total	528,000.00	100.00

140 Alignments.

Tangent curves.	*Angles.*	*Feet.*	*Miles.*
Level		485,345.10	91.92
0 to 1 deg., inc.	140 deg. 47 min.	15,945.50	3.02
1 " 2 " "	240 " 43 "	12,271.10	2.33
2 " 3 " "	199 " 02 "	6,829.90	1.29
3 " 4 " "	164 " 41 "	4,142.00	0.78
4 " 5 " "	37 " 00 "	740.00	0.14
5 " 6 " "	163 " 28 "	2,724.40	0.52
Total	945 deg. 41 min.	528,000.00	100.00

Bridges.

Pile.	*Trestle.*	*Boxes No.*
6,780 linear feet	90 linear feet	30

Sidings.

31,900 feet.

Compensation grades are reduced $\frac{5}{100}$ of a foot per 100 feet in length for each degree of curvature.

Embankments.

The embankments are 14 feet wide at grade, with slopes of one and one-half horizontal to one perpendicular, to a height of 15 feet. Embankments above 15 feet in height are made with a roadway from 15 to 16 feet in width at grade.

Excavations.

Excavations in earth are 20 feet wide at grade, with slopes from one-half to one base, to one rise depending on the character of the material. Rock excavations are from 16 to 18 feet wide at grade and have slopes $\frac{1}{4}$ horizontal to one perpendicular.

Mechanical structures.

At "Cranes," the 123d mile-post, the end of the first division, there is one six-stall stone engine-house completed; one frame blacksmith shop, 60 x 30; one two-story station, telegraph and eating-house, 60 x 30; one freight-house, 40 x 24; one water tank and pump-house, one section-house, and one tool-house. At other points
141 on this 100 miles there are three wells and temporary water tanks. The material is on hand and permanent. Water stations are in process of construction. Four section-houses, furnished, and four more partially completed, built at intervals of from 10 to 12 miles apart. The section-houses are frame or wooden buildings, two-story, on a stone foundation, plastered and wainscoted in every room, and contain four rooms on the first floor and three on the second. A depot building is in process of construction at

Fort Wingate station. At other stopping places there are neat telegraph offices and station-houses, giving sufficient accommodation for the local traffic. The station-houses, telegraph stations and section-houses are well built and tasty structures, in uniform style.

Bridges.

The bridges are all pile or trestle bridges, spans 15 feet each. Piles are driven wherever possible, and at other places framed bents are used and the sills bolted to the rock. The caps of the piles are 12 x 12 inches, by 14 feet, stringers 7 x 16 inches by 15 feet, three on each side. Ties 6 x 8 inches, by 9 feet, guard-rails 6 x 8 inches, of native pine. The piles are of spruce or pine, none less than 10 inches at small end.

Culverts.

There are 30 box culverts made of 3-inch pine plank, part of them 2 x 1 feet and others 4 x 1 feet, with a support in the middle. These culverts are only placed where needed on the lightest work.

Sidings.

There are (6.4) six and four-tenths miles of side track located at convenient points.

Ballasting.

The road is well ballasted with the clay, sand and gravel peculiar to the country, found along the line.

Cross-ties.

There are 2,816 cross-ties per mile. They are from 6 to 8 inches thick, 8 feet long and not less than 6-inch face, of spruce, pine, oak and cedar. The oak ties are brought from Kansas and Missouri, and are laid on the curves.

142 Rails.

The rails are of steel and of American manufacture, weighing 56 pounds to the yard. They are fastened to the ties by spikes $5\frac{1}{2}$ inches by $\frac{7}{16}$ of an inch, four in each tie. The joints are fastened by the Sampson & Angle splices.

Rolling stock.

Locomotives	28
Plain coaches	4
Combination baggage and smoking cars	3
Baggage, mail and express cars	2
Box cars	241
Coal cars	25
Cabooses	3
Flat cars	901

Telegraph line.

The telegraph line is constructed on cedar posts 30 to the mile, with one No. 9 galvanized wire with glass insulators.

Conclusion.

From our examination, it is evident that the company has chosen the best route and used the best material the country affords to build the road in such manner as it deemed would be the most permanent, having regard to economy and expedition of construction.

We recommend its acceptance.

R. D. MUSSEY.
E. C. DEAN.
SIMON STEVENS.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Before me, the undersigned, a notary public in and for said county and Territory, duly commissioned and qualified, personally came R. D. Mussey, E. C. Dean, and Simon Stevens, to me personally known to be the identical persons whose names are signed to the foregoing instrument of writing, and being by me duly sworn according to law, on their oath do declare that the statements
143 set forth in the foregoing instrument of writing are correct and true according to the best of their knowledge, information, and belief.

Sworn and subscribed before me this 9th day of December, A. D. 1881.

[SEAL.] LEO J. BARR,
Notary Public.

ALBUQUERQUE, NEW MEXICO, *Dec. 9th*, 1881.

The honorable the Secretary of the Interior.

SIR: We have the honor to transmit herewith our report as commissioners, appointed by the President of the United States, to examine 100 miles of railroad built by the Atlantic and Pacific, commencing at a point 100 miles west from the intersection of said company's road with the New Mexico and Southern Pacific railroad, near Isleta, New Mexico, and ending at a point 100 miles westerly from the place of beginning, and accompany the same with maps and profiles of the road examined, duly certified by the president and chief engineer of the company.

By the courtesy of F. W. Smith, general superintendent of the road, with headquarters at Albuquerque, the commissioned went to the "front," 85 miles beyond the line of our examination, to witness the track-laying. We were accompanied by Mr. Smith, by Mr. H. R. Holbrook, the chief engineer, and some of his staff; by B. W. Angell, the division superintendent, and other officers of the road. We were gratified with what we saw.

Track-laying was being done at the rate of nearly two miles per

day. We were informed by the chief engineer that he has 105 miles more graded ready for the superstructure.

We are informed that 312.2 miles of road were completed on December 7th, and that the company has on hand, ready for immediate use, the following materials:

168½	miles	56-pound steels rails, American manufacture.
39	"	Samson angle bars.
30	"	track spikes.
213	"	grip-nut bolts.
45	"	cross-ties.

We enclose "time schedule No. 3," now in effect.

Such management, such superintendence, such engineer-
144 ing needs no commendation. The country expected it. The company has not disappointed them.

Please find enclosed duplicate receipts for our pay and mileage.

We have the honor to be, sir, your obedient servants,

R. D. MUSSEY,
SIMON STEVENS,
E. C. DEAN,
Commissioners.

(Endorsement.)

DEPARTMENT OF THE INTERIOR, *December 22d*, 1881.

Respectfully referred to the commissioner of railroad- for report.

GEO. M. LOCKWOOD,
Chief Clerk.

DEPARTMENT OF THE INTERIOR,
OFFICE OF COMMISSIONER OF RAILROADS,
WASHINGTON, D. C., *Dec. 22st*, 1881.

Hon. S. J. Kirkwood, Secretary of the Interior.

SIR: I have the honor to acknowledge, by reference, the report of the 9th instant, on sections 5, 6, 7, and 8, of twenty-five miles each, of the Atlantic and Pacific railroad, Western division in New Mexico, submitted by commissioners appointed by the President of the United States.

I beg leave to enclose herewith a report by H. Blackstone, Esq., railroad engineer of this office, for your consideration.

Very respectfully, JOS. K. McCAMMON,
Commissioner.

WASHINGTON, D. C., *December 22d*, 1881.

(Mem. for commissioner of railroads.)

I have carefully looked over the maps and profiles of the four sections, of 25 miles each, of the Atlantic and Pacific railway recently examined by the commissioners appointed for that purpose by the President.

The alignment of the road appears to have been intelli-
145 gently and skillfully placed, and the line of gradients throughout are well and admirably drawn, placing the road-bed generally in light embankment, where little or no ditching will be required, and where the road-bed will be dry and cheaply maintained in good shape and condition.

The general intelligence and good judgment displayed in adjusting this alignment and curvature, with a maximum grade of 528 feet per mile and maximum curvature of 6 degrees to the 100 feet, is very creditable, and will compare very favorably with any similar engineering with which I am familiar.

Very respectfully, H. BLACKSTONE,
Railroad Engineer.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 3d*, 1882.

SIR: I have the honor to submit herewith the report of Messrs. R. D. Mussey, E. C. Dean, and Simon Stevens, whom you appointed commissioners to examine the fifth, sixth, seventh, and eighth sections, (25 miles each,) of the Western division, of the Atlantic and Pacific railroad, beginning at a point in the Territory of New Mexico, one hundred miles west of the junction of said road, near Isleta, with the New Mexico and Southern Pacific railroad, and ending at a point in the Territory of Arizona, one hundred miles west of the place of beginning.

The commissioners report said sections as constructed in substantial compliance with law and the instructions of this department. The accompanying telegraph line they also report as having been properly constructed.

In accordance with what I understand to be the ruling of the Supreme Court of the United States, the opinion of the Attorney General, and the action of this department heretofore, I recommend that said sections of railroad and telegraph line be accepted, and that the lands earned by their construction be patented to the Atlantic and Pacific Railroad Company pursuant to law.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

To the President.

146 (Endorsement.)

EXECUTIVE MANSION, *January 5th*, 1882.

The within recommendations of the Secretary of the Interior are hereby approved.

CHESTER A. ARTHUR.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 7th*, 1882.

The Commissioner of the General Land Office.

SIR: I transmit herewith for appropriate action, copy of my letter of the 3d instant, to the President, submitting with recommenda-

tions, the report of Messrs. R. D. Mussey, E. C. Dean and Simon Stevens, commissioners, on the 5th, 6th, 7th and 8th sections, of 25 miles each, of the Western division of the Atlantic and Pacific railroad, beginning at a point 100 miles west of Isleta, New Mexico, and ending at a point in Arizona 100 miles from the place of beginning, with the President's endorsement thereon affirming the recommendations.

The map and profile accompanying the report are also transmitted herewith.

Very respectfully, S. J. KIRKWOOD, *Secretary.*

Mr. SPRINGER: I offer in evidence act of Congress, approved April 27th, 1871, authorizing the Atlantic and Pacific Railroad Company to mortgage the lands granted to it by the act of 1866, marked Exhibit No. 9, and which is as follows:

EXHIBIT No. 9.

An act to enable the Atlantic and Pacific Railroad Company to mortgage its road.

Be it enacted, &c., That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seventh, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of
147 them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

Mr. SPRINGER: I offer in evidence the deposition of H. W. Gardiner, secretary of the company, showing the resolutions of the directors of the Atlantic and Pacific Company, authorizing the making and issuing of the bonds, and mortgages to secure them, and prescribing the terms, conditions and limitations thereof, as provided by the act of April 20th, 1871. Also showing the amount of bonds issued and outstanding and money raised thereon, identifying the different mortgages, and showing due payment of interest on the bonds, marked Exhibit No. 10, and which is as follows:

EXHIBIT No. 10.

Deposition of H. W. Gardiner in the action of The Atlantic and Pacific Railroad Company *vs.* Robert Mingus, pending in the district court for the fourth judicial district, sitting within and for the county of San Miguel, in the Territory of New Mexico.

Interrogatory 1. What is your name, age, residence, and occupation?

148 Answer 1. Harrison W. Gardiner; 49; Boston, Massachusetts; secretary and treasurer of the Atlantic and Pacific Railroad Company.

Interrogatory 2. Do you know the parties to this suit?

Answer 2. The plaintiff is The Atlantic and Pacific Railroad Company of which, as I have said, I am the secretary and treasurer. The defendant I do not know.

Interrogatory 3. What official position do you hold in the Atlantic and Pacific Railroad Company?

Answer 3. As I have already stated, I am secretary and treasurer of that company.

Interrogatory 4. If you answer that you are the secretary or assistant secretary of The Atlantic and Pacific Railroad Company, plaintiff in this suit, state whether as such you have in your custody the records of proceedings of the commissioners, stockholders and board of directors of said company since its organization?

Answer 4. As such secretary I have the custody of the records mentioned in interrogatory 4.

Interrogatory 5. If you say you have the custody of such records, please examine the paper now shown you, consisting of thirteen pages, typewritten matter, and certified by H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, to be a true and correct copy from the records of said company, said paper being marked Exhibit "A," and state whether or not the same contains a correct transcript of the records of proceedings therein set forth, taken from the records of said company, and if so, please hand the same to the notary to be attached to your deposition as a part thereof.

Answer 5. I have examined the paper which consists of 14 pages although the last page is numbered 13, there being a page inserted after page 10 and marked page "10½." This paper contains a true and correct copy from the records of the Atlantic and Pacific

149 Railroad Company. I now hand the paper to the notary in order that he may identify it as Exhibit "A," and attach it to my deposition.

Interrogatory 6. Please examine the several papers now submitted to you, purporting to be copies from the records of proceedings of the board of directors of the Atlantic and Pacific Railroad Company, certified by H. W. Gardiner, secretary of said company, and marked respectively Exhibits B, C, D, E and F, and say whether the same are correct transcripts of the record of proceedings therein set forth, as shown by the books in your custody, and if so hand

the same to the notary to be attached to your deposition as a part of your answer.

Answer 6. I have examined the papers marked respectively Exhibits B, C, D, E and F, and find that they are true and correct transcripts from the records of the Atlantic and Pacific Railroad Company, except that the copy of the first mortgage of the Western division of the Atlantic and Pacific Railroad Company, inserted in Exhibit D, is a copy of the executed instrument with the signatures inserted, whereas the copy inserted in the record of the meeting was without the signatures. The same is true of the copy of the indenture relating to the Western Division income bonds of the Atlantic and Pacific Railroad Company, inserted in Exhibit E, which is a copy of the executed instrument, whereas the copy inserted in the record of the meeting was without the signatures. In all other respects these exhibits are true and correct transcripts from the records of the Atlantic and Pacific Railroad Company, and I have compared all of them, as well as Exhibit A, with the original records of the company in my custody as secretary. I now hand these papers to the magistrate in order that he may identify them respectively as Exhibits B, C, D, E and F.

Interrogatory 7. Please state what amount, par value, of
150 bonds, were issued by said Atlantic and Pacific Railroad Company, under each of the following-mentioned several mortgages, and what amount thereof are still outstanding and unpaid, to wit:

1. Central Division land-grant mortgage, dated November 1st, 1871, mentioned in Exhibit B, to your last answer?

2. Western Division first mortgage, dated July 1st, 1880, mentioned in Exhibit D, to your last answer?

3. Western Division income mortgage, dated October 1st, 1880, mentioned in Exhibit E, to your last answer?

4. Central Division first mortgage, dated March 1st, 1882, mentioned in Exhibit F to your last answer?

Answer 7. Of the Central Division land-grant bonds there were issued $796,629, all of which are outstanding and unpaid.

Of the Western Division first-mortgage bonds, there were issued $16,000,000, all of which are unpaid and are held in trust by the Mercantile Trust Company as security for the guaranteed trust four per cent. gold bonds of the Atlantic and Pacific Railroad Company.

Of the Western Division income bonds there were issued $12,000,000, all of which are still outstanding and unpaid.

Of the Central Division first-mortgage bonds there were issued $2,794,000, all of which are unpaid and are held in trust by the Mercantile Trust Company in the same way as the Western Division first-mortgage bonds, as part of the security for the said guaranteed trust four per cent. gold bonds.

Interrogatory 8. State whether or not the said bonds so issued and outstanding have been negotiated and sold, and the moneys realized therefrom applied towards the construction of the Atlantic and Pacific railroad.

Answer 8. They have been so sold and the moneys so applied.

Interrogatory 9. State whether or not the interest upon
151 the bonds so as aforesaid issued and outstanding has been paid according to the tenor and effect thereof, up to the present time.

Answer 9. Yes, sir.

Interrogatory 10. State whether or not default exists as to payment of interest or principal on any of the bonds so as aforesaid issued and outstanding; if so, which ones and to what amount?

Answer 10. No, sir.

Interrogatory 11. State whether any of the said mortgages have been foreclosed, and if so, which ones?

Answer 11. No, sir; none of them have been foreclosed.

Interrogatory 12. State any other fact within your knowledge of benefit to the plaintiff or material to the issues in this case?

Answer 12. I am not sufficiently informed as to the issues in this case to answer this question.

Cross-interrogatory 1. What amounts of money were realized from the sales of bonds issued under the various mortgages inquired of in the direct examination?

Answer 1. The following memorandum shows the disposition of the several issues of bonds which I have mentioned, and the amounts respectively derived therefrom:

Memorandum.

Central Division land-grant bonds, Nov. 1st, 1871.....	$796,629
Delivered to subscribers for Central Division preferred stock at the rate of 57 per cent. of their respective subscriptions.	
Western Division first-mortgage bonds, July 1st, 1880.	$16,000,000
Delivered to subscribers at par.....	$15,978,000
Sold for cash, $22,000, at	17,600
	$15,995,600
152 Western Division income bonds, October 1st, 1880.....	$12,000,000
Delivered to subscribers with Western Division first-mortgage bonds	11,994,500
Sold for cash, $5,500, at.....	1,100
Central Division first-mortgage bonds, March 1st, 1882.	2,794,000
Delivered to subscribers and others at par	$1,601,000
Sold for cash, $3,000, at	2,100
	$1,603,100

Issued in exchange for prior-lien bonds, which were originally issued to subscribers for Central Division preferred stock, at the rate of 85 per cent. of their respective subscriptions, $1,190,000.

(Signed) HARRISON W. GARDINER.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

It having been stipulated by counsel for plaintiff and defendant in the action, Atlantic and Pacific Railroad Company *vs.* Robert Mingus, which action is pending in the district court for the fourth judicial district, sitting within and for the county of San Miguel, in the Territory of New Mexico, the said stipulation being hereto attached, that the testimony of H. W. Gardiner, secretary or assistant secretary of the Atlantic and Pacific Railroad Company, a witness for the plaintiff, might be taken before any notary public in the city of Boston, Massachusetts, upon interrogatories and cross-interrogatories, which are hereto annexed, notice of time and place of taking the deposition being waived, on this 25th day of November, A. D. 1892, at Boston, before me, T. Frank Noonan, a notary public, duly commissioned and authorized, and doing business in said county and Commonwealth, appeared Harrison W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, who, being duly
153 sworn by me to tell the truth, the whole truth, and nothing but the truth, made answer under oath to the said interrogatories; and I hereby certify that I personally know the aforesaid Harrison W. Gardiner to be the person he purports to be, and that the answers in the foregoing deposition contained were signed and sworn to before me by the said Harrison W. Gardiner.

Witness my hand and seal notarial, the day and year last above written.

(Signed) T. FRANK NOONAN,
[NOTARIAL SEAL.] *Notary Public.*

EXHIBIT A.

TURNER HALL, ST. LOUIS, MO., *October 1st*, 1866.

In accordance to a call published, signed by the commissioners from the State of Missouri, and in pursuance of the requirements of an act, passed at the First session of the Thirty-ninth Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," the board of commissioners named in said act met for organization at Turner hall, in the city of St. Louis, Missouri, on the first day of October, anno Domini, 1866, at the hour of twelve o'clock at noon.

The meeting was called to order by Hon. Emil Preetorious, commissioner from Missouri, upon whose motion Hon. Levi Parsons, commissioner from Pennsylvania, was chosen chairman. On motion of Samuel P. Dinsmore, from Maine, Charles H. Howland, commissioner from Missouri, was chosen secretary of the meeting.

On a call of the roll the following commissioners were present, namely: Samuel P. Dinsmore, of Maine; John C. Fremont, of New
154 York; Jesse M. Bolles, of New York; James P. Robinson, of New York; Oliver P. C. Billings, of New York; Levi Parsons, of Pennsylvania; Bird B. Chapman, of Ohio; Israel Dille, of Ohio; John H. Hersey, of Wisconsin; William Mitchell,

of Minnesota; Benj. R. Bonner, of Missouri; Emil Preetorious, of Missouri; E. W. Fox, of Missouri; Charles H. Howland, of Missouri; Madison Miller, of Missouri; George L. Hewitt, of Missouri; Charles E. Moss, of Missouri; Allen R. Easton, of Missouri; James B. Eads, of Missouri; Charles K. Dickson, of Missouri; George W. Fishback, of Missouri; Daniel R. Garrison, of Missouri; William Gilpin, of Colorado; Leonidas Haskell, of California; John Boyd, of Connecticut.

On motion of Samuel P. Dinsmore, it was

Ordered, that the bond of the treasurer shall be for the sum of one hundred thousand dol-ars, the sureties to be approved by the president and secretary.

On motion of Charles E. Moss, the meeting proceeded to the election by ballot, of a president, vice-president, secretary, and treasurer.

Messrs. Samuel P. Dinsmore, of Maine, and Bird B. Chapman, of Ohio, were appointed tellers by the chair.

The chair announced the result of the ballot to be as follows:

Whole number of votes cast twenty-four. Of these there were cast for president, for John C. Fremont, twenty-three; for vice-president, for Daniel R. Garrison, of Missouri, twenty-three; for Thomas A. Scott, of Pennsylvania, one; for secretary, for Charles H. Howland, of Missouri, twenty, and Benjamin R. Bonner, of Missouri, four; for treasurer, for Charles K. Dickson, of Missouri, three, and James P. Robinson, of New York, twenty-one; resulting in the election for president, John C. Fremont, of New York; vice-president, Daniel R. Garrison, of Missouri; secretary, Charles H. Howland, of Missouri; treasurer, James P. Robinson, of New York.

155 On motion of Madison Miller, of Missouri, a committee of two were appointed to conduct the president-elect to the chair.

The chair appointed Madison Miller and E. W. Fox, of Missouri, said committee.

The president, on taking the chair, delivered an interesting and concise address, full of information concerning the enterprise.

On motion of Samuel P. Dinsmore, of Maine, it was

Ordered, that the president and secretary of this board of commissioners be, and the same are hereby directed to open books for subscription to the capital stock of the Atlantic and Pacific Railroad Company, in the city of St. Louis, State of Missouri, (in parlor No. 6 of the Southern hotel), on the second day of October, anno Domini 1866, at 10 o'clock in the forenoon, and that they issue the notice for the first meeting of the stockholders, in pursuance of an act passed at the First session of the Thirty-ninth Congress, incorporating said company, and entitled "An act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast."

On motion of ——

Resolved, That Gen. J. C. Fremont be requested to write out the interesting remarks he has just addressed us, for publication.

On motion of Jas. B. Eads, of Missouri, it was

Ordered, that the thanks of this board of commissioners be tendered to Hon. B. Gratz Brown, Senator from Missouri, and the originator in the Senate of the act incorporating this company; to the members of the Missouri delegation in Congress, also to the members of Congress from other States who labored for and secured the passage of said act.

On motion of ——, the thanks of this meeting were tendered to Hon. Levi Parsons, of Pennsylvania, for his labors in securing the organization of the company.

The board then adjourned to assemble at the call of the president.

156 The following is a copy of the bond of the treasurer:

Know all men by these presents, that we, James P. Robinson, of New York, as principal, and Frederick Billings, of the State of California, and Levi Parsons, of New York State, as sureties, are holden and stand firmly bound unto the Atlantic and Pacific Railroad Company, a corporation created by act of Congress of the United States of America, in the full and just sum of one hundred thousand dollars, to the said company, their successors and assigns, well and truly to be paid.

Sealed with our seals, and dated this second day of October, in the year of our Lord one thousand eight hundred and sixty-six.

The condition of the foregoing obligation is such that, whereas, at a meeting of the board of commissioners of said company, duly called and held at the Turner hall, in the city of St. Louis, on the first day of said October, said Robinson was duly chosen treasurer as named in the first section of the said act incorporating said company and has accepted the said office.

Now, therefore, if the said Robinson shall well and truly do and perform the duties of said office, and shall well and truly keep and on proper warrant pay over and deliver all such monies and valuables as shall come into his possession as treasurer as aforesaid, and shall well and truly observe all and singular the provisions of said act, and of any subsequent acts amendatory thereof, so far as they may relate to said office, then this obligation shall be and become null and void, otherwise in full force and virtue.

(Signed)	J. P. ROBINSON.	[SEAL.]
(Signed)	FREDERICK BILLINGS.	[SEAL.]
(Signed)	LEVI PARSONS.	[SEAL.]

Signed, sealed and delivered in the presence of—
CHAS. H. HOWLAND.

The board of commissioners of the Atlantic and Pacific Railroad Company.

The foregoing bond of James P. Robinson and others, being such as the said board of commissioners deem proper, is hereby approved by them, and such approval is verified by the signatures of their president and secretary.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

157 SAINT LOUIS, *October 5th*, 1866.

Pursuant to the instructions of the board of commissioners. in a resolution passed at their meeting in Turner hall, October 1st, 1866, the president and secretary opened the books for subscription to the capital stock of the Atlantic and Pacific Railroad Company, at parlor No. six in the Southern hotel, in the city of Saint Louis, October 2d, A. D. 1866, at 10 o'clock a. m. Said books remained open until Friday, October 5th, A. D. 1866, when the amount necessary by law, viz: ten thousand shares, having been subscribed and the sum of ten dollars per share paid over to the treasurer the books were then closed.

The following is a correct copy of the subscription book and the subscriptions thereto.

Atlantic and Pacific Railroad Company.

Subscriptions to the Capital Stock.

We, the undersigned, hereby subscribe to the capital stock of the Atlantic and Pacific Railroad Company, a corporation created by act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, in such sums and number of shares as appear opposite our names respectively, hereby binding ourselves, our administrators, executors and assigns, to the payment of such subscriptions, in such installments as the said act requires, and as the board of commissioners, created by said act, or the board of trustees, or directors to succeed such commissioners may from time to time require, in pursuance of a resolution passed at a meeting of the board of commissioners held the first day of October, 1866, authorizing books for subscription to be opened this day.

St. Louis, Oct. 2d, 1866.

Oct. 4th, J. C. Fremont, New York, fifteen hundred shares.

Oct. 4th, J. C. Fremont (trustee), New York, seven hundred and fifty shares.

158 Oct 4th, J. C. Fremont (trustee), New York, five hundred shares.

Oct. 4th, Frederick Billings, California, one thousand shares.

Oct. 4th, Levi Parsons, New York, one thousand shares.

Oct. 4th, Geo. Yost, Fort Plain, New York, per Levi Parsons, four hundred shares.

Oct. 4th, Edward Parsons, Chicago, per Levi Parsons, two hundred shares.

Oct. 4th, Ward & Co., New York, per F. B., two hundred shares.

Oct. 4th, Leonidas Haskell, New York, four hundred shares.

Oct. 4th, J. P. Robinson, New York, five hundred shares.

Oct. 4th, J. P. Robinson, attorney for J. Caldwell, Boston, four hundred shares.

Oct. 4th, J. P. Robinson, attorney for F. L. A. Pioche, San Francisco, two hundred shares.

Oct. 4th, J. P. Robinson, attorney for L. L. Robinson, San Francisco, two hundred shares.

Oct. 4th, Bouvier & Howland, St. Louis, Mo., one hundred shares.

Oct. 4th, O. P. C. Billings, New York, two hundred shares.

Oct. 4th, Samuel P. Dinsmore, New York, 72 William St., one hundred shares.

Oct. 4th, Edward Gilbert, 71 Broadway, New York, one hundred shares.

Oct. 4th, James Taussig, St. Louis, Mo., two hundred and fifty shares.

Oct. 4th, Emil Preetorious, St. Louis, Mo., two hundred and fifty shares.

Oct. 4th, B. B. Chapman, Elyria, O., one hundred shares.

Oct. 4th, D. R. Garrison, St. Louis, Mo., sixteen hundred shares.

The above subscriptions having been completed and the books closed in pursuance of the further requirements of the act of incorporation, the president and secretary issued the following
159 notice, which was published in the St. Louis Democrat and the St. Louis Republican the proper period of time:

Atlantic and Pacific Railroad Company.

A meeting of the subscribers to the stock of the Atlantic and Pacific Railroad Company will be held at the office of the Southwest Pacific Railroad Company, No. 15 Nassau St., in the city of New York, for the purpose of organization and election of thirteen directors, according to the requirements of the charter of said company, on Wednesday, October 31st, 1866, at 12 o'clock, noon.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

NEW YORK CITY, *Oct.* 31*st*, 1866.

Pursuant to a notice published as required by law, the subscribers to the capital stock of the Atlantic and Pacific Railroad Company assembled at the office of the Southwest Pacific Railroad Company, No. 15 Nassau street, New York city, on October 31st, at 12 o'clock, noon, for the purpose of electing thirteen directors.

John C. Fremont, president, and Charles H. Howland, secretary, the officers designated by law to act as inspectors of said election, were present and performed said duty.

The following persons were then elected directors of the company: John C. Fremont, Levi Parsons, Frederick Billings, James P. Robinson, Chas. H. Howland, Samuel P. Dinsmore, Daniel R. Garrison, George Yost, Leonidas Haskell, Josiah Caldwell, Chas. H. Ward, O. P. C. Billings, L. L. Robinson.

On motion of Levi Parsons, it was

Resolved, That the directors of the Atlantic and Pacific Railroad Company be requested to purchase the Southwest Pacific Railroad of Missouri, upon the best terms and to the best advantage possible.

On motion of Levi Parsons, it was

160 Resolved, That the board of directors be empowered and authorized to create such offices, and to appoint or elect such officers, agents or servants as they may deem necessary and proper for the administration and prosecution of the affairs of the company.

On motion of Levi Parsons, it was

Resolved, That the board of directors be requested to prepare for publication as soon as convenient, a report of the route with its advantages, and the affairs of the company.

On motion the meeting then adjourned *sine die.*

The following is a copy of the certificates of the inspectors of the election:

NEW YORK, *Nov. 13th*, 1866.

This is to certify that in accordance with the requirements of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, we, John C. Fremont, president, and Charles H. Howland, secretary of the board of commissioners appointed under said act, have as the legally constituted inspectors of the election for thirteen directors to be chosen by the subscribers of the capital stock to the Atlantic and Pacific Railroad Company, at a meeting convened on the 31st of October, 1866, attended to said duty, and do hereby declare that the following persons, subscribers to the capital stock of said company and entitled to vote at said election, have received a majority of the legal votes cast at said election: J. C. Fremont, Levi Parsons, Frederick Billings, Jas. P. Robinson, Charles H. Howland, Samuel P. Dinsmore, Daniel R. Garrison, George Yost, Leonidas Haskell, Josiah Caldwell, Charles H. Ward, O. P. C. Billings, L. L. Robinson; and we hereby declare the aforementioned persons to be legally elected directors of said Atlantic and Pacific Railroad Company.

(Signed) J. C. FREMONT, *President.*

(Signed) CHAS. H. HOWLAND, *Secretary.*

161 The following is a copy of the notices served upon the persons elected, informing them of their election:

NEW YORK, *Nov. 12th*, 1866.

SIR: At a meeting of the subscribers to the capital stock of the Atlantic and Pacific Railroad Company, convened on the 31st day of October, 1866 (in pursuance to notice published according to law,) at the office of the Southwest Pacific Railroad Company, No. 15 Nassau street, New York city, you were elected a director of said company, having received a majority of the legal votes cast.

(Signed) J. C. FREMONT, *President,*
CHAS. H. HOWLAND,
Secretary, Inspectors of Election.

Also a copy of the notice served upon the directors-elect to meet for organization:

NEW YORK, *Nov. 13th*, 1866.

SIR: You are hereby notified that there will be a meeting of the directors of the Atlantic and Pacific Railroad Company for the purpose of organization and such other business as may be presented, on Tuesday, Nov. 20th, 1866, at 12 o'clock, noon, at the office of the Southwest Pacific Railroad Company, No. 54 William street, New York city.

You will please acknowledge receipt on the face of this notice and return it.

Yours truly,

(Signed by) J. C. FREMONT.
CHAS. H. HOWLAND.
JOSIAH CALDWELL.
LEONIDAS HASKELL.
SAMUEL P. DINSMORE.
O. P. C. BILLINGS.
LEVI PARSONS.
JAMES P. ROBINSON.
FRED'K BILLINGS.
C. H. WARD.

NEW YORK CITY, *Nov. 20th*, 1866.

At a meeting of the board of directors of the Atlantic and Pacific Railroad Company, held pursuant to the foregoing call of a
162 majority of the members of the board-elect, the undersigned, president and secretary of the board of commissioners of the Atlantic and Pacific Railroad Company, formally delivered into the possession of the said board of directors duly organized, the books, papers, etc., of the board of commissioners.

J. C. FREMONT,
President of Board of Commissioners of A. & P. R. R. Co.

CHAS. H. HOWLAND, *Secretary.*

The following is a copy of the minutes of the board of directors of the Atlantic and Pacific Railroad Company (at their meeting held on Nov. 22d, 1866), relating to delivery of books, papers, property, etc.:

On motion of Samuel P. Dinsmore, it was

Ordered, that this board hereby acknowledge the delivery over to them by the board of commissioners of the Atlantic and Pacific Railroad Company, their treasurer and secretary, of all the monies, properties, subscription books and other books heretofore in their possession as such commissioners; treasurer, and secretary, and the secretary of this company be directed to cancel the bond given by the treasurer aforesaid to said board of commissioners and preserve the same cancelled on the files of this company.

(Signed) LEVI PARSONS,
Ass't President of the Board of Directors of A. & P. R. R. Co.

(Signed) CHAS. H. HOWLAND, *Secretary.*

NEW YORK CITY, *Nov. 20th*, 1866.

Pursuant to a call of a majority of the newly elected board of directors of the Atlantic and Pacific Railroad Company, the board met for the purpose of organization at the office of the Southwest Pacific Railroad Company, at No. 54 William street, New York city, at twelve o'clock, noon, on Tuesday, Nov. 20th, 1866.

Present: Levi Parsons, Jno. C. Fremont, Jas. P. Robinson, Chas. H. Ward, Leonidas Haskell, O. P. C. Billings, S. P. Dinsmore,
163 Chas. H. Howland, Josiah Caldwell.

General John C. Fremont was called to the chair, and Chas. H. Howland appointed secretary of the meeting.

The notice calling the meeting was then read, and also the certificate of the inspectors of election, at which the board was elected, and were ordered spread on the minutes.

(NOTE.—The above-mentioned papers will be found recorded on pages 27 and 28 of these records.)

John C. Fremont, president, and Chas. H. Howland, secretary of the board of commissioners, then formally delivered to the board of directors the books, papers, etc., of the board of commissioners.

On motion of Jas. P. Robinson, it was

Ordered, that the officers of this company shall be a president, assistant president, first vice-president (resident of Missouri), second vice-president (resident of California), secretary and treasurer, and such other officers as may be provided by the by-laws of the company to be hereafter adopted.

On motion of L. Haskell, it was

Resolved, That the board now proceed to the election of officers, the vote to be *viva voce*.

Whereupon John C. Fremont was unanimously elected president; Levi Parsons was unanimously elected assistant president; Daniel R. Garrison was unanimously elected first vice-president (resident in Missouri); Lester L. Robinson was unanimously elected second vice-president (resident in California); James P. Robinson was unanimously elected treasurer; Chas. H. Howland was unanimously elected secretary.

On motion of Levi Parsons, it was

Ordered, that the secretary be authorized and directed to procure the necessary books and papers for the use of the company, including certificates of stock.

On motion of Levi Parsons, it was

164 Ordered, that the following model of a seal be adopted for the purpose of authenticating to the United States Government the acceptance by the company of the terms, conditions and impositions of the act incorporating the company, and for other purposes where the use of the company's corporate seal is requisite, until such time as a seal with more complete devices shall be adopted by the company.

(Design of seal.)

On motion of S. P. Dinsmore, it was

Ordered, that the acceptance by the Atlantic and Pacific Railroad Company of the terms, conditions and impositions of the act passed by Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific ocean," approved July 27th, 1866, be signified in writing under the corporate seal of the company, and that the president and secretary authenticate such acceptance and signification, and cause the same to be deposited in the office of the Secretary of the Interior, and that for all purposes the provisions of said act be deemed and taken to be accepted by the company.

I, H. W. Gardiner, secretary of the Atlantic and Pacific
[SEAL.] Railroad Company, hereby certify that the foregoing is a true and correct copy from the records of said company.

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Company.

EXHIBIT B.

Resolved, That the form of bond submitted to the board for the Central Division land-grant bond, with the form of mortgage to secure the same be approved, and that the president or vice-president and treasurer be and they hereby are authorized to execute, acknowledge and deliver the same to the trustees therein.

This indenture, made the first day of November, in the year of our Lord one thousand eight hundred and seventy-one, between the Atlantic and Pacific Railroad Company, a corporation duly formed
and organized under an act of the Congress of the United
165 States, party of the first part, and Oliver Ames and Charles F. Choate, both of the city of Boston, and Commonwealth of Massachusetts, parties of the second part:

Whereas, the said Atlantic and Pacific Railroad Company is a corporation duly formed and organized under an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866:

And whereas, in and by said act of Congress certain lands were granted to the said party of the first part to aid in the construction of such railroad and telegraph line from Missouri and Arkansas to the Pacific coast, it being therein provided as follows, to wit:

"SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections

per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved
166 numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad."

And whereas, by an act of the Congress of the United States, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms, as its directors may deem advisable; and to secure said bonds the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations, as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the

Interior. Provided that if the company shall hereafter
167 suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And whereas, the said party of the first part, for the purpose of obtaining means to continue the construction and equipment of the said railroad and telegraph line, and for its other lawful purposes, has resolved to make, issue, and negotiate its bonds to an amount not exceeding twenty thousand dollars for each mile of such parts of its railroad and the branches thereof as are located between the western boundaries of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of the State of Texas and the River Rio Grande, to consist of a series of bonds, for one thousand dollars each, numbered consecutively, from number 1 (one) upwards, and of a series of bonds for five hundred dollars each, also numbered consecutively from number 1 (one) upwards, and which bonds are to bear even date herewith, and, except as to the numbers and amounts thereof, are to be all of the same tenor and in the form following, that is to say:

No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Central division.

Land-grant Bond, Principal and Interest Payable in Gold.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted to Oliver Ames and Chas. F. Choate, both of Boston, Massachusetts, or bearer, in the sum of — dollars, in gold coin of the United States of America, which the said Atlantic and Pacific Railroad Company hereby promises to pay to the said Oliver Ames and Charles F. Choate or to the bearer
168 hereof in the gold coin aforesaid, on the first day of November, one thousand nine hundred and one, at the agency of said railroad company in the city of New York, together with interest thereon from the first day of November one thousand eight hundred and seventy-one, at the rate of six per centum per annum, in like gold coin of the United States of America, payable at the maturity of this bond, or as may hereafter be provided by a resolution of the directors of said company; such interest being free from and without any deduction for any income or other tax, which now is or hereafter may be, imposed upon the same by the Government of the United States, said company hereby agreeing to assume and pay any such tax.

This bond is one of an issue of bonds not exceeding twenty thousand dollars for each mile of such parts of the said company's railroad, and the branches thereof, as are located between the western bound-

ary of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of said State of Texas and the River Rio Grande, consisting of a series of bonds for one thousand dollars each, numbered consecutively from number 1 (one) upwards, and of a series of bonds for five hundred dollars each, numbered consecutively from number 1 (one) upwards, which bonds are all of even date, and of like tenor, except as to the number and amounts thereof, and the payment whereof is equally secured by a certain deed of trust or mortgage, bearing even date herewith, to the said Oliver Ames and Charles F. Choate, as trustees, duly executed and delivered by the said Atlantic and Pacific Railroad Company, whereby the said company mortgages to said trustees all the right, title, and interest which the said company now has, or may hereafter acquire, of, in, and to all of those portions of the lands coterminous with said parts of said railroad and its branches, and granted or intended to be granted to it by a certain act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, which are distant twenty miles from the said parts of said railroad and its branches on either side thereof, and extend to the distance of forty miles therefrom on each side thereof.

169 It is provided in the said deed of trust or mortgage, that the net proceeds of the sale of any of the lands included therein, which shall be sold by the said railroad company, shall be paid to the trustees under said deed, to be applied to the payment of the accrued interest upon the said bonds (if the same shall have been provided to be paid by a resolution of the directors of the said company), or to the purchase and cancellation of the said bonds at the times, in the manner, and upon the terms expressed in said deed; and it is further provided in said deed that said bonds shall be receivable at par in payment for any and all such lands which shall be sold as aforesaid; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery, or by transfer upon the books of said railroad company, at the option of the holder.

After a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer, except upon the books of the said railroad company, shall be valid, unless the preceding transfer shall have been to bearer, and transferability by delivery thereby restored; but this bond shall continue susceptible of successive registrations and transfers to bearer, as aforesaid, at the option of the holder.

This bond shall not become valid or obligatory until it shall have been authenticated by a certificate endorsed hereon, and duly signed by the trustees, or by the successors of said trustees, in the trust created by said deed.

In witness whereof, the said Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and the same

to be attested by the signatures of its president and treasurer, this first day of November, A. D. 1871.

—— ——, *President.*

—— ——, *Treasurer.*

And whereas, for the purpose, among other things, of identifying the said bonds as those which are entitled to the benefit of the security afforded by these presents, each of them is to have endorsed upon it a certificate signed by the said parties of the second part, or by their successors in the trusts, hereby created in the following words, that is to say: "We hereby certify that this is one of
170 the issue of bonds mentioned in the mortgage executed by the Atlantic and Pacific Railroad Company to us, within mentioned, dated November 1st, 1871, and intended to be secured thereby." And each of the said bonds is to have affixed to it the requisite amount of stamps required by the internal revenue laws of the United States.

And whereas, the said party of the first part being about to issue and negotiate some of the said bonds for the purpose aforesaid, have also resolved to secure the principal and interest of all the same, or of such of them as may be from time to time issued or negotiated by a mortgage of the premises hereinafter described, and conveyed to the said parties of the second part in trust for the equal benefit of all of the persons and corporations, who may at any time become the holders of any of the said bonds, without any preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same.

Now, therefor*f*, this i-denture witnesseth, that the said party of the first part, for and in consideration of the premises and of the sum of one dollar to it in hand duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and in order the better to secure the payment of the principal and interest of the said bonds, according to the tenor thereof, has granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, and transfer unto the said parties of the second part, as joint tenants, and not as tenants in common, and to the survivor of the said parties of the second part, and the heirs and assigns of such survivor, all of the right, title, and interest which the said party of the first part, by reason, or for, or in respect of the construction of those parts of the Central division of its railroad and telegraph line, or any part or branch thereof, which or shall be located between the western boundary of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of the said State of Texas and the River Rio Grande, now has, or shall, or may hereafter, at any time have or acquire of, in, and to all those portions of the lands situated in
171 the Indian Territory or the Territory of New Mexico coterminous with or appurtenant to, said parts of said Central division of said railroad and its branches, and granted, or intended to be granted, to the said party of the first part, as aforesaid, which are or

shall be distant twenty miles from the said parts of said railroad and its branches, on each side thereof, and which do, or shall extend to the distance of forty miles from said parts of said railroad and its branches, on each side thereof; and also, all of the right, title, and interest of the said party of the first part of, in, and to any and all lands wherever situated, which under and by virtue of the provisions of the said above-recited third section of the said act of Congress the said party of the first part is authorized to select, under the direction of the Secretary of the Interior, in lieu of any of the said lands hereinbefore referred to, of which the said party of the first part has been or may be deprived by reason of the same having been granted, sold, reserved, occupied for homestead settlers or pre-empted, or otherwise disposed of, as provided in the said third section of the said act of Congress, approved July 27th, 1866, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part and parcel thereof, with the appurtenances:

To have and to hold the said lands and premises hereinbefore granted unto the said parties of the second part, as joint tenants, and not as tenants in common, and unto the survivor of the said parties of the second part, his heirs and assigns; in trust for the security and benefit of all and every the person or persons or bodies corporate who shall be, or at any time become, the holder or holders of the said bonds hereby intended to be secured, or of such of them as shall be issued and negotiated by the said party of the first part, without preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same, upon the trusts and to and for the
172 uses and purposes hereinafter expressed, that is to say:

Article first. In case default shall be made in the payment of the principal of said bonds, or any of them, or of the interest thereon as therein provided, it shall be lawful for the trustees under these presents personally, or by attorneys or agents, to enter into and upon all and singular the lands and premises aforesaid, and take actual possession of the same; and after such entry, or other entry, or without entry, to sell and dispose of all and singular the said lands and premises, in one or more parcels, as the said trustees shall deem most expedient, and all right, title, interest, benefit, and equity of redemption of the said party of the first part, its successors or assigns therein, at public auction in the city of Boston, or in the city of New York, or in the city of St. Louis, or in any county or town in which the said lands or any part thereof may be situate: Provided, that, preparatory to such sale or sales, the said trustees shall give public notice of the time and place thereof, by advertisement, published not less than once in each week, for six successive weeks, in one newspaper of good circulation in each of the

cities of Boston, New York, and St. Louis, and in one newspaper (if any such there shall then be) published in the county in which the said trustees shall make such sale. And the said trustees shall be and are hereby fully authorized and empowered, after such publication, to make such sale or sales, at the time and place mentioned in such advertisement, or to adjourn the same from time to time in their discretion, and, if so adjourning, to make the same, without further notice, at the time to which the same may be so adjourned, and at the place mentioned in the advertisement of sale; and as the attorneys of the party of the first part hereto, for that purpose by these presents duly authorized, constituted, and appointed, or otherwise, to execute and deliver to the purchaser or purchasers at any such sale, or to his or their assigns, a good and sufficient deed or deeds of conveyance in the law for the lands which shall be sold as aforesaid to such purchaser or purchasers, whereby the same shall be granted and assured in fee-simple to such purchaser or purchasers, or to his or their heirs or assigns; and any sale made as aforesaid shall be a perpetual bar, both in law
173 and equity, against the said party of the first part hereto, its successors and assigns, and against any and all persons claiming or to claim the premises thus sold, or any part thereof, by, from, through, or under the said party of the first part, its successors or assigns.

And it is hereby further declared and agreed, that it shall be lawful for the said trustees to deduct from the proceeds of such sale all expenses connected therewith,—including proper compensation for their own services, and the fees and charges of any attorneys and counsel by them employed in the premises,—and also any advances or liabilities properly made or incurred by them (the said trustees) in connection with the said lands and premises, or any part or parcel thereof, while the said lands or premises shall have been in their possession, and also the amount of any taxes and assessments upon the said premises, or any part thereof; and, after making the deductions aforesaid, it shall be lawful for the said trustees, and it shall be their duty to apply the balance of the said proceeds of sale, together with any other moneys, if any, received by them in connection with said premises, to the payment of the principal of said bonds, and of the interest accrued thereon, ratably and without discrimination or preference as between principal and interest, and without regard to the time of the actual issue of said bonds; and if, after paying in full the principal of said bonds, and all interest accrued thereon, a surplus of said moneys shall remain, to pay over such surplus to the said party of the first part, its successors or assigns, or as any court of competent jurisdiction shall direct.

And it is hereby declared and agreed, that the receipt or receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers at any such sale, for the purchase-money of any lands which shall be sold as aforesaid, and that such purchaser or purchasers, after paying such purchase-money and receiving such receipt, shall not be liable to see to the application of such purchase-

money, or be in any manner whatsoever answerable for any misapplication or non-application thereof.

Article second. At any sale of the lands aforesaid, or any part thereof, whether the same be made in virtue of the power herein granted or by judicial authority, if such sale would discharge
174 or impair the lien created by these presents, the said trustees shall be and they are hereby authorized and empowered to bid for and purchase, in behalf of all the holders of the bonds secured by this instrument which shall be then outstanding, the property so sold, or any part thereof, in the proportion of the respective interests of such bondholders; provided, that nothing herein contained shall authorize the said trustees to bid on behalf of all the holders of said bonds a sum exceeding the aggregate amount of said bonds then outstanding, with the interest accrued thereon and the expenses of such sale, for the entire property then held upon the trusts of this i-denture, or an amount reasonably proportionate thereto, for any part of the said property.

Article third. The net proceeds of the sales of any of the lands hereinbefore granted or conveyed, or expressed or intended so to be, which shall at any time hereafter be sold by the said party of the first part, its successors or assigns, while the said bonds or any thereof remain outstanding, shall be paid over by the said party of the first part, its successors or assigns, upon the receipt thereof, or within a reasonable time thereafter, to the trustees under this i-denture, and the same, together with all interest thereon, which shall come within the disposal of the said trustees, shall be applied, semi-annually, first, to the payment of the accrued interest upon the said bonds (if the same shall have been provided to be paid by a resolution of the directors of the said party of the first part, and shall remain unpaid), and, secondly (or if there shall have been no resolution of the said directors providing for the payment of such interest) to the purchase and cancellation of the then outstanding bonds secured by these presents, if the same can be purchased at not exceeding a premium of ten per cent. upon the par value thereof, with the interest accrued thereon; provided, that, preparatory to such purchases of bonds, the trustees shall advertise, once in each week for three weeks in one or more of the daily newspapers published in the cities of New York and Boston, for bonds to be sold, and shall make such purchases of bonds at the lowest price or prices at which the said bonds may be offered, pursuant to such advertisement, or at such lower price or prices as the
175 said trustees may, with reasonable diligence, be able to obtain the same for, at public or private sale; and if the said trustees shall not be able to obtain said bonds at not exceeding the rate aforesaid within thirty days after the expiration of such advertisement, the said moneys shall be deposited by the said trustees in some safe depository, approved by the board of directors of said company, in either of the cities of New York or Boston, and thereafter the said moneys, with all accumulations of interest thereon which may come within the disposal of said trustees, shall be applied, from time to time, to the purchase of said bonds, at not

exceeding the rate aforesaid, whenever the same can be obtained at not exceeding such rate. The said party of the first part may at any time authorize the purchase of said bonds at a higher rate than the rate aforesaid, but the purchase thereof at such higher rate shall be within the discretion of said trustees notwithstanding such authorization.

Article fourth. The trustees under these presents shall, at all times, be authorized to employ and appoint such clerks, assistants, agents, and attorneys as they shall reasonably require, to discharge any duty under these presents in relation to the lands aforesaid, and all clerks, assistants, agents, and attorneys, so necessarily or properly employed or appointed, shall be paid by the party of the first part, its successors or assigns, from the proceeds of the sales of said lands; and the said trustees shall be fully authorized to constitute and appoint an agent or attorney to execute conveyances, releases, or other instruments necessary and proper to be executed by them to release from the lien and operation of these presents any of the said lands which shall be sold as hereinafter authorized, and to act generally in behalf of said trustees, in respect thereto, which agent may be removed by said trustees, in their discretion, and another appointed in his place; and all instruments executed and acts done by such agent, within the scope of his authority, in respect to said lands, shall be as legal and valid as if executed or done by the said trustees personally.

The said party of the first part shall cause the lands aforesaid to be carefully valued and appraised in such divisions or parcels as shall seem to it most expedient for the purpose of selling the
176 same, and in such valuation and appraisement all lands containing, or supposed to contain coal or iron, shall be distinguished from those which are valued as agricultural, and true copies of such valuation and appraisement shall be made, one of which copies, certified by the president of the said party of the first part under the corporate seal thereof, shall be deposited with each of the said trustees, but the said valuation and appraisement may, from time to time, be changed in regard to the whole or any part of the lands included therein, provided a copy of such new valuation shall be deposited as aforesaid.

And it is hereby declared and decreed, that the said party of the first part, and its successors, shall be entitled to contract for the sale of said lands, or any part or parcel thereof, at the appraised value aforesaid, and may sell the same partly on credit: Provided, that before conveyance of any lands so sold shall be made to the purchaser, any amount of purchase-money remaining unpaid shall be secured by a purchase-money mortgage upon the premises sold, which purchase-money mortgage shall be duly assigned to the trustees under these presents, at or before the delivery of such conveyance or release.

Article fifth. The trustees shall convey, by way of release or otherwise, to any party or parties designated by the said party of the first part, its successors or assigns, or release from the lien and operation of these presents in such manner as such trustees may be advised,

any and all lands granted or conveyed by this indenture, or expressed or intended so to be, which shall or may be hereafter sold by the said party of the first part, its successors or assigns: Provided, that such lands shall not be sold by the said party of the first part, its successors or assigns, at less than the appraised value thereof, according to the appraisement theretofore delivered to said trustees, without the consent in writing of said trustees, and that conveyances and releases shall not be executed by the trustees unless the net proceeds of the sales of the lands so sold shall be paid over to them by the said party of the first part, its successors or assigns, or by the purchaser of such land, to be by said trustees applied, as in article third of these presents is set forth.

And it is hereby further declared and agreed, that the bonds
177 secured hereby shall be received as cash at their par value and accrued interest by the said party of the first part, its successors and assigns, in payment for any of said lands hereby mortgaged which may be sold by said party of the first part, its successors or assigns.

Article sixth. If the said party of the first part shall well and truly pay the principal of each of the said bonds when the same shall become payable, and all interest thereon, as such interest shall mature, according to the tenor of such bond, then and in that case, that is to say, after the payment of said bonds and all interest thereon in full, all the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust by these presents created, shall cease, determine, and become void, otherwise the same shall be and remain in full force and virtue.

Article seventh. It is mutually agreed by and between the parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee under these presents for the time being, whether such trustees or trustee be the parties of the second part, or the survivor of them, or any successors or successor of the said parties of the second part, or either of them, in said trust; and whenever a vacancy in the trust shall exist, the said word "trustees," as used herein, shall be construed to mean the surviving or continuing trustee. And it is further mutually agreed, that the said trustees shall be entitled to just compensation for all services hereafter to be rendered by them in this trust, which compensation shall be paid by the said party of the first part, its successors or assigns, from the proceeds of the sales of the lands hereby mortgaged; that the said trustees shall not be responsible for the default or misconduct of each other or of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care; that the said trustees, or either of them, may resign, and be discharged of the trust created by these presents, by giving notice in writing to the party of the first part, or its successors, three months before such resignation shall take effect, or such shorter notice as the said party of the first part, or its successors may accept; that the said trustees, or either of them, may be removed by the holders of a majority in interest, of the whole amount of
178 said bonds, by an instrument in writing, signed by such ma-

jority in interest: Provided, that such removal shall be subject to the approval of, and shall not take effect until approved by the board of directors of the said party of the first part; that in case at any time hereafter the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the other of the parties of the second part, or by the remaining trustee, at the time being, by an instrument in writing under his hand and seal, and so, from time to time, in case of the death, resignation, removal, or unfitness to act of either of the trustees, at the time being, his place may be filled in like manner by the remaining trustee. But in case of reglect to appoint such new trustee at any time when a vacancy shall occur, the party of the first part may by an instrument in writing, authorized by its board of directors, and duly executed under its corporate seal, make such appointment, and it is hereby covenanted and agreed, that any new trustee, appointed as aforesaid shall immediately, upon his appointment, and without any further act, deed or conveyance, become, and be vested with all of the estate, trust, rights, powers and duties of the trustee in whose place he shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall, and will upon request, make, execute, and deliver all such releases, conveyances, and assurances as shall be appropriate to vest in and confirm and assure to such new trustee such estate, trust, rights, powers, and duties according to the intent above expressed.

And the said party of the first part, for itself, its successors and assigns, hereby, for the consideration aforesaid, further covenants, promises and agrees, to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust by these presents created, that the said party of the first part, its successors or assigns, shall and will well and truly pay unto the holder or holders of said bonds the principal and interest thereof, as such principal and interest shall become payable, according to the tenor of said bonds, respectively.

179 And the said party of the first part, for itself, its successors and assigns, in consideration of the premises, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust created by these presents, that whenever and as often as the said party of the first part, its successors or assigns, shall hereafter acquire any of the lands intended to be mortgaged by these presents, the said party of the first part, its successors and assigns, shall and will acquire, possess and hold the same, and every part and parcel thereof, upon and subject to the trusts of this indenture, until conveyance thereof, in pursuance of the covenant next hereinafter contained shall be duly made and delivered to the said parties of the second part, or the survivor of them, or their or his successors in the trust by these presents created.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said parties of

the second part, and the survivor of them, and their and his successors in the trust created by these presents, that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the said parties of the second part, or the survivor of them, or their or his successors in the trust hereby created, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the said parties of the second part, or the survivor of them, or their or his successors in said trust, upon the trusts herein expressed, all and singular the lands hereinbefore mentioned or described, as by them or him, or by their or his counsel learned in the law, shall be reasonably advised, devised or required.

In witness whereof, the said Atlantic and Pacific Railroad Company, party of the first part, has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and treasurer; and the said Oliver Ames and Charles F. Choate have hereunto set their hands and seals to evidence the acceptance of the trust hereby created, the day and year first above written.

Sealed and delivered in the presence of—

——— ———.

180 I, H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, hereby certify that the above is a [SEAL.] true and correct copy of a vote passed by the board of directors of said company, at a meeting held on October 19th, 1871.

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Co.

EXHIBIT C.

Resolved, That this company issue 14,000 shares of Central Division preferred stock, $1,200,000 of Central Division first-mortgage and land-grant bonds, $800,000 of Central Division land-grant bonds, and $660,000 of second-mortgage railroad and land-grant bonds, Missouri division.

I, H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, hereby certify that the above is a [SEAL.] true and correct copy of a vote passed by the board of directors of said company, at a meeting held on October 19th, 1871.

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Company.

EXHIBIT D.

Voted, that the draft of the first mortgage upon the Western division, and of the bonds to be secured thereby, and of the in-

dorsement to be made on said mortgage, in the words and form following, namely:

Atlantic and Pacific Railroad Company.

First Mortgage, Western Division.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, party of the second part, witnesseth:—

181 That whereas, the party of the first part, under the act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip, and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the Pacific ocean, and hereinafter described and referred to as the "Western division;"

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31st, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to complete said Western division as rapidly as practicable; and that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards, until the first day of October, A. D. 1910,—and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company, and said St. Louis and San Francisco Railway Company, have executed the contract of guaranty indorsed hereon.

And whereas, said act of Congress provides as follows:

"SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway

182 and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said

company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

183 "SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and continuous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to

said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:"

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said
184 company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Coupon Six per Cent. Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, together with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-

annually on the first days of January and July, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad
185 Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company, under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the
186 books of the Atlantic and Pacific Railroad Company, at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company

has caused its corporate seal to be affixed hereto, and these [SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

187 It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely—

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any ad-

vances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the
188 Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and
[SEAL.] these presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be indorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, indorsed upon said mortgage.

—— ——, *Trustee.*

And whereas, the party of the first part, being about to issue some of said bonds and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all of the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue,
189 or of any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second

part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign, and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and in equity, of the party of the first part of, in, and to the same and any and every part thereof, with the appurtenances.

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of
190 any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half with the Boston Safe Deposit and Trust Company of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approve, to the credit of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining and operating said Western division of the Atlantic and Pacific Railroad Company, and for the

payment of the interest maturing on such bonds, until the completion of said division to the Pacific coast, or until said party of the second part shall, by a contract with any other road, form a through line, properly equipped, to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division, or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part, during construction, monthly accounts, showing the application of said proceeds; and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion, from time to time sell the lands received from the United States under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and tele-
191 graph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold, and the party of the second part, its successor or successors in said trust, shall, upon demand, from time to time, release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable, provided however that the appointment of the land commissioner shall be made by the party of the first part, with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable; and such certificates shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Company of New York, trustee, or its successor or successors in said trust, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds,

whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be
192 received at par and accrued interest in payment for any and all said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings, or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain, and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights, and property of every kind, with the appurtenances included in this mortgage, and collect, receive, and use the rents, tolls, issues, income, and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may, personally or by its, his, or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph, and all franchises, property, and appurtenances of every description belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income, and profits thereof, and shall sell
193 and dispose of said lands and land grants, and after paying all taxes, assessments, and liens superior to the lien created by these presents, and all proper expenses of constructing, operating, and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

1. To the payment of interest on said first-mortgage bonds.

2. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third, in amount, of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due,

the said remainder shall be applied to payment of interest and principal without preference.

3. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and all other interest-bearing indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises, and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims, and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be
194 waived by the written assent thereto of a majority in interest of the bonds outstanding, but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, upon demand of the holders of one-fourth, in amount of said first-mortgage bonds outstanding with indemnity for expenses liable to be incurred shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago, and San Francisco, not less than three times a week for six successive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance, made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first past, and all persons claiming through, by, or under the said party. The party of the

second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency, or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the prin-
195 cipal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law, for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipment, and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his, or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of records of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding, at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth, in amount, of all said bonds outstanding; and any vacancy in the trusteeship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity, or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the
196 party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured,

to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and powers before vested in his or its predecessor under its mortgage and upon the trusts, agreements, and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances, and assurances in the law, for the better assuring to such successor or successors the said estates, rights, titles, properties, interests, and powers, as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis, and San Francisco, twice each week, for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled, in person or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys, or servants in the discharge of said trust; and the just and reasonable charges of said trustee and its agents, attorneys, and servants, shall
197 be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered, or neglected by its or their agents, attorneys, servants, or employés, selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused

its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By THOS. NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

[SEAL.] UNITED STATES TRUST CO. OF NEW YORK,
By JOHN A. STEWART, *President.*

Attest: JAMES S. CLARKE, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

On this third day of August, A. D. 1880, before me, Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they
198 signed, attested and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.] LEVI C. WADE.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

On this ninth day of August, A. D. 1880, before me, came John A. Stewart, with whom I am personally acquainted, who being by me duly sworn, says that he resides in said city; that he is the president of the United States Trust Company of New York; that he knows the corporate seal of the said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation, by the like authority.

[NOTARIAL SEAL.] HENRY L. THORNELL,
Notary Public, New York Co.

Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agreement under seal, dated January 31st, 1880, wherein, among other things, they agreed that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be oper-

ated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the Mississipi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910—

Now therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally covenant and agree with the Atlantic and Pacific Railroad Company
199 and the United States Trust Company of New York, trustee, in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will contribute, ratably to the earnings hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. (25 per cent.) of the gross amount of their said described earnings respectively during the six months, ending on the first days of October and April, preceding the due date of such coupons.

In witness whereof, the said St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, have severally caused their corporate seals to be at-
[SEAL.] tached hereto, and these presents to be signed by their respective presidents, and attested by the secretary of the first-named and the assistant secretary of the last-named company, on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*

Attest: C. LITTLEFIELD, *Secretary.*

[SEAL.]

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By T. JEFFERSON COOLIDGE, *President.*

Attest: GEO. L. GOODWIN,
Assistant Secretary.

Is hereby approved and adopted, and the president and
200 secretary are authorized and directed to execute the said mortgage and affix the company's seal thereto. And the

company's solicitor is instructed to procure the execution thereof, by the United States Trust Company of New York, trustee, to have the same recorded in the office of the Secretary of the Interior, and to deliver the same to the said trustee.

I, H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, hereby certify that the above is a true and correct copy of a vote passed by the board of directors of said company, at a meeting held on July 13th, 1880.

[SEAL.]

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Company.

EXHIBIT E.

The solicitor presented the draft of the income mortgage of this company as follows:

This indenture, made this first day of October, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, party of the second part, witnesseth:

That whereas, said party of the first part is the owner of a certain line of railway and telegraph now in process of construction between the Rio Grande river and the Pacific ocean, beginning at Albuquerque on the Rio Grande river in the Territory of New Mexico, and thence running westwardly by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing; thence by the most practicable and eligible route to the Pacific ocean, or however otherwise located or described, being known
201 as the Western division of the Atlantic and Pacific railroad; and the party of the first part is now constructing and will construct, complete, equip, and open the same for traffic as rapidly as practicable;

And whereas, the party of the first part, on the first day of July, A. D. 1880, mortgaged the railroad, telegraph, equipment, appurtenances, and other property mentioned in said mortgage or intended so to be, now and hereafter composing or appertaining to said Western division, to the United States Trust Company of New York, trustee, to secure the payment of the principal and interest of its first-mortgage, six per cent., coupon and registered, gold bonds to an amount not exceeding twenty-five thousand dollars a mile, to be issued and disposed of from time to time, upon such terms as the directors of the party of the first part deem expedient;

And whereas, in case the proceeds of said bonds and of the income bonds hereinafter provided for shall prove insufficient to pay the cost of construction and equipment, including interest on said

first-mortgage bonds, until the completion of said division to the Pacific coast, or until said party of the first part shall, by a contract with any other road, form a through line to the Pacific coast, and for one year thereafter; or in case the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company, under their contract of guaranty indorsed upon said mortgage, make any advances to the party of the first part, at any time, to pay the interest on said first-mortgage bonds, in whole or in part, the party of the first part, in accordance with its agreement so to do, hereby reserves the right to issue its second-mortgage interest-bearing bonds to an amount not exceeding ten thousand dollars a mile, and to dispose of them on such terms as the directors of said party of the first part deem advisable, and to secure the payment of the principal and interest of the same by a mortgage of said franchises, rights, railroad, telegraph, equipment, appurtenances, and other property to one or more trustees, subject only to the lien created by said first mortgage.

And whereas, the party of the first part has determined to make and issue its income bonds to an amount not exceeding eighteen thousand seven hundred and fifty dollars a mile, to consist
202 of a series of bonds registered of the denominations of $500, $1,000, $5,000, and $10,000, and bonds to bearer of the denominations of $50, $100, $500, and $1,000, with dividend warrants attached, all of said bonds to be of even date herewith, and the principal sum therein named to be payable in lawful money of the United States of America on the first day of October, A. D. 1910, at the agency of the party of the first part in the city of Boston, in the State of Massachusetts, with interest thereon in like currency payable at said agency semi-annually, on the first day of April and the first day of October, from the net earnings of said Western division during the six months ending on the first day of January and the first day of July, respectively, preceding in each year, whatever said earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings, applicable to such payments being the earnings of said Western division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of said railroad, telegraph, equipment, and appurtenances;

And whereas, the party of the second part is willing to act as trustee for the benefit and security of any and all persons and corporations who may be or become holders of any of said income bonds,—

Now, therefore, the party of the first part, in consideration of the premises, and one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest of said income bonds according to the tenor thereof, without preference, by reason of priority of issue, or any cause or thing whatsoever, does for itself, its successors and assigns, hereby covenant and agree to and with

the party of the second part, who is hereby declared to be the trustee for any and all persons and corporations who may be or become holders of any of said income bonds, and to and with its successor or successors in said trust, that it will semi-annually, as soon as may be after the first day of January and the first day of July, and at least ten days before the first day of April and the first day of October, respectively, in each year during the continuance of
203 this trust, make up and furnish to the trustee for the time being a fair and just account of the payments, expenses, and gross and net earnings of said Western division for the six months ending on said first day of January or July, as the case may be, so as to exhibit the true sum applicable to the payment of interest on said income bonds; and will pay the said interest, or so much thereof as has been earned, on the first days of April and October, respectively, according to the true intent and meaning hereof.

And at all reasonable times the said trustee or its successor in said trust, or its or his agents or attorneys, may, and, upon the written request of holders of said bonds to the amount of one million dollars and with proper indemnity for expenses, shall, examine all the books, documents, and papers of the party of the first part in any manner relating to its earnings and expenditures upon said Western division, for the purpose of verifying and correcting said accounts; and all said books, documents, and papers shall at all reasonable times be accessible to the said trustee, its or his agents or attorneys.

And the party of the second part hereby accepts said trust, and agrees to execute the same, but without any responsibility except for wilful default or gross negligence in the premises, and without any liability for the defaults or negligence of any agent or attorney, selected in good faith in the discharge of said trust.

The present or any future trustee may resign upon thirty days' notice to said company, and to the registered holders of said income bonds, or may be removed at any time by a vote of a majority in interest of said income bondholders, at any meeting of the said bondholders, such vote being attested by the signatures of the persons so voting, or by the party of the first part, with the written consent of one-fourth in interest of said bondholders; and any vacancy caused by the dissolution, death, removal, resignation, incapacity, or refusal to act, of the present or any future trustee, may be filled by appointment made by the party of the first part, or by the majority in interest of said bondholders, or, in case of their failure to make such appointment for a period of sixty days, by any justice of the Supreme Court of the United States, upon the application of any of the parties in interest; and, immediately
204 upon the making of such appointment, in any of the ways aforesaid, all the rights, powers, and interests hereby conferred upon the trustee herein named, its successor or successors in said trust, shall pass to and become vested in such substituted trustee, without any other or further acts or deeds whatsoever.

Meetings of said bondholders may be called at any time by either of the parties hereto, by holders of said bonds, to the amount of one

million dollars, or less amount if so many are not outstanding, or by a committee of said bondholders appointed at a previous meeting, by publishing notice of the time and place of said meeting at least twice a week in one or more daily newspapers published in the cities of Boston and New York, for six weeks prior to the time appointed. And every bondholder, in person or by proxy, may vote at such meeting in proportion to the amount of said bonds owned and held by him.

In witness whereof, the parties hereto have severally caused their corporate seals to be hereto affixed and these presents to [SEAL.] be signed by their respective presidents, and attested by their respective secretaries, on the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By THOS. NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

[SEAL.]

BOSTON SAFE DEPOSIT AND TRUST COMPANY,
By F. M. STONE, *President.*

Attest: EDWARD P. BOND, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
City of Boston, County of Suffolk, }

On this first day of October, A. D. 1880, before me, Levi C. Wade, a notary public in and for said city and county, personally appeared Thos. Nickerson and S. W. Reynolds, known to me to be respectively president and secretary of the said Atlantic and Pacific Railroad Company, and also F. M. Stone and Edward P. Bond, known to me to be respectively president and secretary of said Boston Safe
205 Deposit and Trust Company, and on oath severally deposed and said that they were respectively such presidents and secretaries, that they executed the foregoing instrument and affixed the corporate seals of the said companies thereto, as appears, by order of their respective boards of directors, and by the like authority they severally acknowledge the same to be the free act and deed of said companies respectively.

In witness whereof, I have signed my name and affixed my notarial seal hereto, the day and year above written.

[NOTARIAL SEAL.] LEVI C. WADE.

Form of Registered Bond.

No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Western division.

For value received, the Atlantic and Pacific Railroad Company promises to pay to the Boston Safe Deposit and Trust Company, or the registered holder hereof, the sum of — dollars, in lawful money

of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually, on the first day of April and the first day of October in each year, from the net earnings of the Western division of the Atlantic and Pacific railroad during the six months ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the earnings of said Western division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the city of Boston, in the State of Massachusetts.

It is agreed between the Atlantic and Pacific Railroad Com-
206 pany and the holder of this bond that no recourse shall be had for its payments to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of the provisions of an indenture of even date herewith, executed by the Atlantic and Pacific Railroad Company and the Boston Safe Deposit and Trust Company, trustee.

This bond is transferable only upon the books of the Atlantic and Pacific Railroad Company by the registered holder or his duly authorized attorney, and is not valid unless authenticated by a certificate indorsed hereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of October, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

Form of Bonds, with Dividend Warrants Attached.

No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Western division.

For value received, the Atlantic and Pacific Railroad Company promise to pay to the Boston Safe Deposit and Trust Company, or bearer, the sum of — dollars in lawful money of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually on the first day of April and the first day of October

207 in each year, from the net earnings of the Western division of the Atlantic and Pacific railroad during the six months ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding the rate of three per cent. for each six months, and non-cumulative, upon presentation of the dividend warrants hereto annexed; the net earnings applicable to such payments being the earnings of said Western division properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the city of Boston, in the State of Massachusetts. It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of an indenture of even date herewith, executed by the Atlantic and Pacific Railroad Company, and the Boston Safe Deposit and Trust Company, trustee.

This bond is transferable by delivery, or, upon surrender of the divided warrants hereto annexed, it may be registered, and thereafter will be transferable only upon the books of the railroad company by the registered holder or his duly authorized attorney, and principal and interest will be payable accordingly. This bond is not valid, unless authenticated by a certificate indorsed thereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these [SEAL.] presents to be signed by its president, and attested by its secretary, on this first day of October, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

208 *Trustee's Certificate.*

The within bond is one of the series of income bonds, coupon and registered, mentioned in, and is entitled to the benefit of, an indenture of even date executed by the said Atlantic and Pacific Railroad Company to the Boston Safe Deposit and Trust Company, trustee, its successor or successors in said trust.

—— ——, *Trustee.*

Dividend Warrant.

The Atlantic and Pacific Railroad Company will pay to the bearer on the first day of April, on surrender of this warrant, at its agency in the city of Boston, Mass., the proportionate part of the net income of its Western division for the half calendar year ending on the first day of —— preceding, according to the terms and conditions of its income bond No. —, but not exceeding — dollars.

—— ——, *Treasurer.*

Voted, that the foregoing draft of an indenture to be executed by this company with the Boston Safe Deposit and Trust Company, trustee, for the holders of the income bonds of this company, and also the foregoing forms for *for* said income bonds, and the trustee's certificate thereon, are hereby approved, and that the president and secretary are directed to sign and attest said indenture, to affix the company's corporate seal thereto, and to acknowledge the same as the free act and deed of the company.

I, H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, hereby certify that the above is a true and correct copy of a vote passed by the board of directors of said company, at a meeting held on October 28th, 1880.

[SEAL.]

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Co.

EXHIBIT F.

Voted, that the form of first mortgage upon the Central
209 division, submitted to this meeting, and of the first-mortgage bonds to be issued thereunder, be and the same is hereby approved and adopted, and that the said mortgage be fully executed under seal by the officers of this company and delivered to the trustee named therein, and that said form be spread upon the records:

Atlantic and Pacific Railroad Company.

First Mortgage, Central Division.

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and eighty-two, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the Central Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, party of the second part, witnesseth—

That whereas, the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip, and put in operation as rapidly as

practicable that part of said company's authorized line of railroad and telegraph lying between the western boundaries of the States of Missouri and Arkansas and the town of Albuquerque, on the Rio Grande river in the Territory of New Mexico, and hereinafter described and referred to as the "Central division."

And whereas, the party of the first part has entered into and duly executed an agreement with the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, dated Jan. 9th, 1882, providing among other things for the resumption of the work of construction of said Central division, in which agreement the said St. Louis and San Francisco Railway Company and the said Atchison, Topeka and Santa Fe Railroad Company have agreed to make and execute the contract of guaranty indorsed upon this mortgage.

And whereas, said act of Congress provides as follows:—

210 SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this

act, and in lieu thereof a like quantity of unoccupied and un-
211 appropriated agricultural lands in odd-numbered sections nearest to the line of said road and within twenty miles thereof may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal; And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of said Atlantic and Pacific railroad.

SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and, if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and continuous with said completed section of said road. And, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:—That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bear-
ing such rate of interest, and to dispose of them on such terms
212 as its directors may deem advisable; and, to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that

part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the Central division, has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:—

57.

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Central division.

First-mortgage Coupon Six per Cent. Forty-year Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the Central Trust Company of New York, trustee, or bearer, one thousand dollars, on the first day of March, A. D. 1922, in gold coin of
213 the United States of America, of, or equivalent to, the present standard of weight and fineness, together with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of March and September, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due. Both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a mortgage of even date herewith to the Central Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Central division, as set forth in said mortgage, and upon the trusts therein declared; and to all of the provisions in the said mortgage contained this bond is hereby expressly made subject.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the Central Trust Company of New York, trustee, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon said mortgage.

214 4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company, under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company, at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the Central Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these [SEAL.] presents to be signed by its president and attested by its secretary, this first day of March, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Central division.

First-mortgage Registered Six per Cent. Forty-year Gold Bond.

215 Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the Central Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of March, A. D. 1922, in gold coin of the United States of America, of, or equivalent to, the present standard of weight and

fineness, with interest thereon. at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of March and September, both principal and interest payable at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a mortgage of even date herewith to the Central Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Central division, as set forth in said mortgage, and upon the trusts therein declared; and to all of the provisions in the said mortgage contained this bond is hereby expressly made subject.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the Central Trust Company of New York, trustee, and used solely—

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Com-
216 pany and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon said mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions. This bond is not valid unless authenticated by a certificate indorsed thereon, and signed by the Central Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company
[SEAL.] has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, this first day of March, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be indorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a mortgage of even date herewith, executed by said railroad company to the Central Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Central division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company indorsed upon said mortgage.

CENTRAL TRUST CO. OF NEW YORK, *Trustee*,
By —— ——.

217 And whereas, the party of the first part, being about to issue some of said bonds, and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described, to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue or of any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust.

Now therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does by these presents, grant, bargain, sell, transfer, assign and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part, known as the Central division, beginning at the west line of the State of Missouri, near Seneca, and thence by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and also beginning at or near the town of Fort Smith on the western boundary of the State of Arkansas, and thence westwardly by the most practicable route to a point on the Canadian river, where it will intersect the line from Seneca westward, and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurte-

nances thereunto belonging or in anywise appertaining, and
218 also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and in equity, of the party of the first part of, in, and to the same and any and every part thereof, with the appurtenances.

The said grant and conveyance is, however, subject to a lien upon said franchises and property of said Central division to the extent of one million one hundred and eighty-nine thousand and nine hundred and five dollars of outstanding railroad and land-grant bonds, issued under and secured by a prior mortgage on said Central division, dated the first day of November, 1871, which said outstanding bonds the party of the first part hereby covenants and agrees to procure and cancel as soon as possible by giving in exchange therefor the first of the bonds issued hereunder, or by purchasing them out of the proceeds of the first sale of the bonds issued hereunder, a majority both in number and interest of the holders of said outstanding prior bonds having already agreed to accept an equal amount of the bonds issued hereunder in exchange therefor. The said party of the first part covenants that no further bonds shall be issued under said prior mortgage, and that, as soon as the said outstanding bonds shall have been procured and cancelled, the said prior mortgage shall be thereupon immediately cancelled and destroyed.

To have and to hold the aforegranted premises to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents, to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds, from time to time issued and negotiated, shall, excepting such portion as
219 may have been used as aforesaid in procuring said outstanding Central Division bonds, be deposited with the United States Trust Company of New York, the Central Trust Company of New York, the Boston Safe Deposit and Trust Company, Boston, and the American Loan and Trust Company, Boston, or, in whole or in part, with such other trust companies, as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approve, to the credit of the party of the first part, and shall be used for the payment of debts and obligations contracted for such construction and equipments of the road westward from Seneca, Missouri, in the Indian Territory, and westward through the Indian Territory from or near Fort Smith, in the State of Arkansas, to the point of junction with the main line from Seneca to Albuquerque, and for the payment of any

such interest on any first-mortgage bonds, issued on said division, as shall accrue on or before January 1st, 1887, as the same may be necessary and not otherwise met or provided for by the earnings and rebate applied to such payment of interest by the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, under their respective contracts of guarantee contained in said agreement of January 9th, 1882.

Any of the first-mortgage bonds issued hereunder out of the first three million dollars, not required for construction or for payment of interest or for any other purposes herein named, and any surplus of any future issues of said bonds not required for construction of the further extension of said division, shall be applied at par and accrued interest to pay the principal and interest of sundry promissory notes given by the party of the first part to the said St. Louis and San Francisco Railway Company and the said Atchison, Topeka and Santa Fe Railroad Company respectively, under a tripartite agreement between the said three companies, dated January 31, 1880, or for coupons on the old Central Division first-mortgage bonds, paid by the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, which became due on or after May 1, 1880. The party of the first part agrees to complete said Central division, or form such through line as aforesaid, with due and reasonable diligence; and to furnish to the party of the second part, during construction, monthly accounts, showing the application of said proceeds; and to permit at any and all reasonable times an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion, from time to time sell the lands received from the United States under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold; and the party of the second part, its successor or successors in said trust, shall, upon demand, from time to time, release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable, provided, however, that the appointment of land commissioner shall be made by the party of the first part, with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable; and such certificate shall, for the protection of the party of the second part,

be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the Central Trust Company of New York, trustee, its successor or successors in said trust, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

221 2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest. Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings, or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph: Provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time, execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain, and enjoy the railroad and telegraph composing said Central division, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive, and use the rents, tolls, issues, income and profits thereof.

Article 5. If there shall be any default in the payment of
222 the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may, personally or by its, his, or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property, and appurtenances of

every description belonging or pertaining to said Central division, and any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income, and profits thereof, and shall sell and dispose of said lands and land grants, and, after paying all taxes, assessments, and liens superior to the lien created by these presents, and all proper expenses of constructing, operating, and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows:

1. To the payment of interest on said first-mortgage bonds.

2. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due, the said remainder shall be applied to payment of interest and principal without preference.

3. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3; and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing indebtedness pertaining to said Central division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And if the earnings of said rail-
223 road and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid shall surrender and restore the railroad and telegraph with all the rights, franchises, and property of every kind pertaining to said Central division, and all additions thereto and extensions thereof, and reserving all funds which should be retained and applied under article 3 shall deliver up all monies, bills, accounts, claims, and demands of every name and nature pertaining to said Central division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage: Provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding, but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell

the said franchises, rights of way, railroad, telegraph, land, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description then composing and pertaining to said Central division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago, and San Francisco, not less than three times a week for six successive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such
224 sale good and sufficient deed or deeds in the law for the same in fee-simple: which sale and conveyance, made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part and all persons claiming through, by, or under the said party. The party of the second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency, or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law, for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph, equipment, and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Central division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his, or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a ma-
225 jority in interest of the holders of all said bonds outstanding, at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth in

amount of all said bonds outstanding; and any vacancy in the trusteeship hereby created occasioned by the dissolution, death, resignation, removal, incapacity, or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy, at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests, and powers before vested in his or its predecessor under this mortgage and upon the trusts, agreements, and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors, and administrators respectively, that they will execute, acknowledge, and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances, and assurances in the law, for the better assuring to such successor or
226 successors the said estates, rights, titles, properties, interests, and powers, as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis, and San Francisco, twice each week, for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled, in person or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys, or servants in the discharge of said trust; and the just and reasonable charges of said trustee and its agents, attorneys, and servants, shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good

faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants, or employés, selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these presents to be signed by its president and attested by its secretary; and the Central Trust Company of New York, in token of its [SEAL.] acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president and attested by its secretary, the day and year first above written.

227 ATLANTIC AND PACIFIC RAILROAD COMPANY,
By H. C. NUTT, *President.*

Attest: C. S. TUCKERMAN, *Secretary.*

[SEAL.] CENTRAL TRUST COMPANY OF NEW YORK,
By H. F. SPAULDING, *President.*

Attest: G. SHERMAN, *Ass't Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

On this first day of March, A. D. 1882, before me, Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared H. C. Nutt and C. S. Tuckerman, known to me to be, respectively in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that by order of the board of directors of said company, they signed, attested, and sealed with said company's seal, the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[SEAL.] LEVI C. WADE,
Notary Public.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

On this 29th day of March, A. D. 1882, before me came Henry F. Spaulding, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in the said city; that he is the president of the Central Trust Company of New York; that he knows the corporate seal of the said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of

the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation, by the like authority.

[SEAL.] D. G. FANNING,
Notary Public, Kings Co.

Filed in N. Y.

228 Whereas, the agreement dated January 9th, 1882, provides that the St. Louis and San Francisco Railway Company shall guarantee the payment of the interest of the said first-mortgage bonds to the extent of twenty-five per cent. of its gross earnings from the business interchanged with the said Central division, other than business going to or coming from the Western division; and also that the Atchison, Topeka and Santa Fe Railroad Company shall guarante- the payment of the interest of the said first-mortgage bonds to the extent of twenty-five per cent. of its gross earnings from all business interchanged by it with the said Central division, going to or coming from points on its own line or lines now existing or hereafter to be built east of the one hundred and fifth principal meridian of longitude; such guaranty on the part of each company to apply and be operative from and after the date of the completion of said Central division to a point about one hundred miles westward from Vinita:—

Now, therefore, in pursuance of said agreement, and in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company do severally covenant and agree with the Atlantic and Pacific Railroad Company and the Central Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that if, at any time after the completion of the Central division of the said company's road, in the within mortgage mentioned, to a point about one hundred miles west from Vinita, its earnings should prove insufficient to pay all coupons or interest on said bonds as they mature, they will contribute ratably, for the purpose of paying and cancelling the same, from their respective earnings, as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty five per cent. of the gross amount of their said described earnings respectively during the six months, ending on the first days of February and August, preceding the due date of such coupons.

229 In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa
[SEAL.] Fe Railroad Company, have severally caused their corporate seals to be attached hereto, and these presents to be

signed by their respective presidents and attested by the secretaries of the above companies, on this first day of March, A. D. 1882.

ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*

Attest:
[SEAL.] C. LITTLEFIELD, *Secretary.*

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By WM. B. STRONG, *President.*

Attest: GEO. L. GOODWIN,
Assistant Secretary.

I, H. W. Gardiner, secretary of the Atlantic and Pacific Railroad Company, hereby certify that the above is a true and correct copy of a vote passed by the board of directors of said company, at a meeting held on February 10th, 1882.
[SEAL.]

H. W. GARDINER,
Secretary Atlantic and Pacific Railroad Company.

Mr. SPRINGER: I offer in evidence exemplified copies of mortgages executed by the Atlantic and Pacific Railroad Company, pursuant to act of April 20th, 1871, from files of Interior Department, marked Exhibits Nos. 11, 11*a*, 11*b*, 11*c*, 11*d*, 11*e*, 11*f*, etc., as follows:

EXHIBIT 11.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

230 Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.
[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

This indenture, made the first day of November, in the year of our Lord one thousand eight hundred and seventy-one, between the Atlantic and Pacific Railroad Company, a corporation duly formed and organized under an act of the Congress of the United States, party of the first part, and Oliver Ames and Charles F. Choate, both of the city of Boston and Commonwealth of Massachusetts, parties of the second part:

Whereas, the said Atlantic and Pacific Railroad Company is a corporation duly formed and organized under an act of the Congress of the United States, entitled "An act granting lands to aid

in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866:

And whereas, in and by said act of Congress certain lands were granted to the said party of the first part to aid in the construction of such railroad and telegraph line from Missouri and Arkansas to the Pacific coast, it being therein provided as follows, to wit:

SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate
231 sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

And whereas, by an act of the Congress of the United States, en-

titled "An act to enable the Atlantic and Pacific Railroad
232 Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to-wit:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms, as its directors may deem advisable; and to secure said bonds the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company, to the lands granted to it by said act, shall extend only to so much thereof as shall be coterminous with, or appertain to, that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

And whereas, the said party of the first part, for the purpose of obtaining means to continue the construction and equipment of the said railroad and telegraph line, and for its other lawful purposes, has resolved to make, issue, and negotiate its bonds from time to time to an amount not exceeding thirty thousand dollars for each mile of that part of its railroad and the branches thereof which are located between the western boundary of the States of Missouri and Arkansas, and the River Rio Grande, and to consist of a series of bonds for one thousand dollars each, numbered consecutively from number 1 (one) upwards, and of a series of bonds for five hundred dollars each, also numbered consecutively from number 1 (one) upwards, and which bonds are to bear even date herewith, and, except as to the numbers and amounts thereof, to be of the same tenor and in the form following, that is to say:

233 No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Central division.

First-mortgage Railroad and Land-grant Bond, Principal and Interest Payable in Gold.

Know all men by these presents, that the Atlantic and Pacific Railroad Company, is indebted to Oliver Ames and Charles F. Choate, both of Boston, Massachusetts, or bearer, in the sum of — dollars, in gold coin of the United States of America, which the said Atlantic and Pacific Railroad Company hereby promises to pay to the said Oliver Ames and Charles F. Choate, or to the bearer

hereof, in the gold coin aforesaid, on the first day of November, one thousand eight hundred and ninety-one, at the agency of said railroad company, in the city of New York, with interest thereon from the first day of November, one thousand eight hundred and seventy-one, at the rate of six per centum per annum, payable semi-annually in like gold coin of the United States of America, at the said agency, on the first days of May and November, in each year, on the presentation and surrender of the annexed coupons, as they severally become due, and so to pay such interest free from, and without any deduction for, any income or other tax, which now is, or hereafter may be imposed upon the same by the Government of the United States; the said company hereby agreeing to assume and pay any such tax.

And it is hereby expressly declared and agreed, that in case default shall be made in the payment of any semi-annual installment of interest on this bond, when such interest shall become payable and be demanded, and such interest shall remain unpaid and in arrear for the period of one year after the same shall have been demanded, the principal of this bond shall become due and payable, in the manner and with the effect provided in the deed of trust or mortgage hereinafter mentioned.

This bond is one of an issue of bonds, not exceeding thirty
234 thousand dollars, for each mile of that part of the company's railroad, and the branches thereof, which are located between the western boundary of the States of Missouri and Arkansas and the River Rio Grande, consisting of a series of bonds for one thousand dollars each, numbered consecutively from number 1 (one) upwards, and of a series of bonds for five hundred dollars each, numbered consecutively from number 1 (one) upwards, which bonds are of like date and of like tenor, except as to the numbers and amounts thereof, and the payment whereof is equally secured by a certain deed of trust or mortgage bearing even date herewith, to the said Oliver Ames and Charles F. Choate as trustees, duly executed and delivered by the said Atlantic and Pacific Railroad Company, whereby the said company mortgages to said trustees all of that part of its railroad and telegraph line, constructed and to be constructed, and the branches thereof, which are located within said limits, together with the epuipments and appurtenances of that part of said railroad, and all the rights, franchises, and privileges thereto belonging, and all the right, title and interest which the said railroad company now has, or shall hereafter acquire, of, in and to ten alternate sections of land, on each side of said railroad for each mile thereof lying nearest to said railroad, between the western boundary of the States of Missouri and Arkansas and said River Rio Grande, being so much of the land which was granted, or intended to be granted, to said railroad company by a certain act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866.

It is provided in the said deed of trust or mortgage, that the net

proceeds of the sale of any of the lands included therein, which shall be sold by the said railroad company, shall be paid to the trustees under said deed, to be applied semi-annually, first, to the payment of the interest on said bonds, and secondly to the purchase and cancellation of said bonds, in the manner and upon the terms expressed in said deed; and it is further provided in said deed that said bonds shall be receivable at par in payment
235 of any, and all such lands, which shall be sold as aforesaid, and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery, or by transfer upon the books of the said railroad company, at the option of the holder thereof.

After a registration of ownership, certified hereon by the treasurer or transfer agent of said company, no transfer, except upon the books of the said railroad company, shall be valid, unless the preceding transfer shall have been to bearer, and transferability by delivery thereby restored; but this bond shall continue susceptible of successive registrations and transfers to bearer, as aforesaid, at the option of the holder.

This bond shall not become valid or obligatory until it shall have been authenticated by a certificate endorsed hereon, and duly signed by the trustees, or the successors of said trustees, in the trust created by said deed.

In witness whereof, the said Atlantic and Pacific Railroad Company has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president, and treasurer, and has also caused the coupons hereto annexed to be signed by its treasurer, this first day of November, A. D. 1871.

—— ——, *President.*

—— ——, *Treasurer.*

And whereas, each of the said bonds is to have attached to it coupons for each semi-annual installment of interest to accrue thereon, payable when they respectively become due in the gold coin of the United States, at the agency of the said company in the city of New York, and each of the said bonds is also to be stamped with the requisite amount of stamps required by the internal revenue laws of the United States, and for the purpose, among other things, of identifying the said bonds as those which are entitled to the benefit of the security afforded by these presents, each of them is to have indorsed upon it a certificate signed by the said parties of the second part, or by their successors, in the trusts hereby created,
236 in the following words, that is to say: "We hereby certify that this is one of the issue of bonds mentioned in the mortgage executed by the Atlantic and Pacific Railroad Company to us, within mentioned, dated November 1st, 1871, and intended to be secured thereby."

And whereas, the said party of the first part, being about to issue and negotiate the said bonds for the purpose aforesaid, have also resolved to secure the principal and interest of all of the same, or of such of them as may be, from time to time, issued or negotiated, by a mortgage of the premises hereinafter described and

conveyed to the said parties of the second part, in trust for the equal benefit of all of the persons and corporations who may at any time become the holders of any of the said bonds, without any preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same.

Now, therefore, this indenture witnesseth, that the said party of the first part, for and in consideration of the premises, and of the sum of one dollar to it duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and in order the better to secure the payment of the principal of the said bonds and all interest thereon as the same shall become payable, according to the tenor of said bonds and the terms of the coupons thereto annexed, has granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, and transfer unto the said parties of the second part, as joint tenants, and not as tenants in common, and to the survivor of the said parties of the second part, and to the heirs and assigns of such survivor, all and singular, all the Central division of the railroad and telegraph line of the said party of the first part, being all that part of the railroad and telegraph line of the said party of the first part, and the branches thereof, now constructed and hereafter to be constructed, which is located and to be located between the western boundary of the States of Missouri and Arkansas and the River Rio Grande, together with the equipments and appurtenances of that part of the said railroad and telegraph line, and the rights, privileges, and franchises thereunto appertaining; including the road-
237 bed and the superstructure, and all the rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all the machine shops and other shops now held or owned, or which shall be hereafter held or acquired by the said party of the first part, its successors or assigns, for use in connection with the said Central division of said railroad, or with any part or branch thereof, or with the business of the same, and also all locomotives, tenders, cars, and other rolling stock, or equipments, and all machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing the said Central division of said railroad, or any part or branch thereof, or any of the equipments, or appurtenances of the said Central division of said railroad, or any part or branch thereof, and also all franchises connected with or relating to the said Central division of said railroad, or the branches thereof, or the construction, maintenance, or use thereof, as fully and completely, to all intents and purposes, as if the said Central division of said railroad, and the branches thereof, were, at the date hereof, fully constructed, completed and equipped.

And all of the right, title, and interest which the said party of the first part, by reason, or for, or in respect of the construction of said Central division of said railroad and telegraph line, or any part

or branch thereof, now has, or shall or may hereafter acquire of, in, and to so much and such portions of the lands granted in and by said act of Congress, approved July 27th, 1866, as shall be coterminous with the said Central division of said railroad and its branches, and as shall be situated within twenty miles on each side thereof, being ten of the alternate sections granted by the said act on each side of every mile of that part of said railroad and its branches which are or shall be situated nearest to the same. And also all of the right, title, and interest of the said party of the first part, of, in, and to any and all lands, wherever situated, which under and by virtue of the provisions of the said above re-
238 cited third section of the said act of Congress, the said party of the first part is authorized to select, under the direction of the Secretary of the Interior, in lieu of any of the lands hereinbefore described or referred to, of which the said party of the first part has been or may be deprived by reason of the same having been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, as provided in the said third section of the said act; and, also, all the property, franchises, rights, and things, of whatever name or nature, now held or hereafter to be acquired by the said party of the first part, its successors or assigns, in connection with or relating to the said Central division of said railroad, or any part or branch thereof, or the construction, maintenance, or use of the same, together with all and singular the tenements, hereditaments, and appurtenances to the said Central division of said railroad, and said lands and premises, or either thereof, belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, revenues, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part thereof, with the appurtenances.

To have and to hold the said Central division of said railroad, and its branches and the said lands and premises, unto the said parties of the second part, as joint tenants and not as tenants in common, and to the survivor of the said parties of the second part, his heirs and assigns, in trust for the security and benefit of all and every the person or persons or bodies corporate who shall be or at any time become the holder or holders of the said bonds or of such of them as shall be issued and negotiated by the said party of the first part, without preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same—upon the trusts and to and for the uses and purposes hereinafter expressed, that is to say:

Article 1. Until default shall be made, by the said party of
239 the first part, its successors or assigns, in the payment of the principal or interest, or some part thereof, of the said bonds, or some one of them, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess, manage, operate, and enjoy the said Central division of said railroad, with its branches, equipments, and appurtenances, and all and singular

the lands, property, and franchises hereinbefore described, and to receive, take, and use the tolls, incomes, revenues, rents, issues and profits thereof.

Article 2. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of said bonds, when such interest shall become payable and be demanded according to the tenor of such bond or the terms of any coupon thereto annexed, and such interest shall remain unpaid and in arrear for the period of one year after the same shall have been demanded, or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due and be demanded, then, and in either and every such case, it shall be lawful for the said parties of the second part, or for the survivor of the said parties of the second part, or for the successors or successor of the said parties of the second part, or of the survivor of them, in the trust hereby created, personally, or by attorneys or agents, to enter into and upon all and singular the said portions of said railroad hereby mortgaged, and the lands and premises aforesaid, and to take actual possession of the same and from thenceforth to have, hold, and use the same, operating the said portions of said railroad, and conducting the business thereof, by such superintendents, managers, receivers and servants, or other attorneys or agents, as the said trustees or trustee so entering shall deem proper, and making from time to time such repairs and replacements, and such useful alterations, additions, and improvements to the said portions of said railroad and premises as the said trustees or trustee shall deem expedient. And it shall be lawful for the said trustees or trustee, after entry as aforesaid upon the said railroad and premises, or any part thereof, to collect and receive all tolls, fares, freights, rents, revenues, issues and profits of the said portions of said railroad and premises, and of every part thereof, and to deduct therefrom the expenses of such entry and the expense of holding, operating, and managing the said portions of said railroad, and conducting the business of the same, including the expenses of such repairs, replacements, alterations, additions, and improvements, as may be made by them or him, as aforesaid, and all payments which may be made or may be due for taxes and assessments; and after making the deductions aforesaid, it shall be lawful for the said trustees or trustee, and it shall be their or his duty, to apply, semi-annually, all tolls, incomes, rents, revenues, issues, and profits of the said railroad to the payment of the interest on said first-mortgage railroad and land-grant bonds, hereby secured, in the order in which such interest shall have become or shall become due, and to pay the same to the persons holding the bonds and coupons evidencing the right to such interest ratably, and without discrimination or preference between them on account of the time of the actual issue of said bonds; and if, after payment of all interest on said bonds, a surplus of said moneys shall remain, to pay over the same to the said party of the first part, its successors or assigns.

Article 3. In case default shall be made in the payment of any interest to accrue on any of said bonds, and such interest shall re-

main unpaid and in arrear for a period of one year after the same shall have been demanded as aforesaid, or in case default shall be made in the payment of the principal, or any part thereof, of the said bonds, or any of them, it shall be lawful for the said parties of the second part, being the trustees under these presents, or for the survivor of them, or for the successors or successor of the said parties of the second part or of the survivor of them, in the trust hereby created, to enter into and upon all and singular the said Central division of said railroad, and its branches and the lands and premises aforesaid, and after such entry, or after other entry, or without entry, personally, or by their or his attorneys or agents, to sell and dispose of the said portions of said railroad with their equipments and appurtenances, and all and singular the lands and other property, rights, and franchises hereinbefore conveyed, or intended so to be, at public auction in the city of Boston, or in the city of
241 New York, or at such place within the State of Missouri as the said trustees or trustee shall designate, and at such time as they or he shall appoint, provided that the said trustees or trustee shall first give notice of the time and place of such sale by advertisement, published not less than three times in each week for six weeks in one or more newspapers in each of the cities of Boston, New York, and St. Louis; and after such advertisement, it shall be lawful for the said trustees or trustee to make such sale at the time and place mentioned in such advertisement, or to adjourn such sale from time to time, and if so adjourning, to make the same without further notice, at the time to which the same may be so adjourned, and at the place mentioned in said advertisement of sale; and to make and deliver to the purchaser or purchasers of the said portions of said railroad, lands, and premises, or of any part thereof, a good and sufficient deed or deeds in the law for the same, in fee-simple; which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through, or under the said party of the first part, its successors or assigns. And after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys' and counsel fees, and all other expenses, advances, or liabilities, which may have been made or incurred by the said trustees or trustee in operating or maintaining the said portions of said railroad, or in managing the business thereof, while in their or his possession, or in arranging for and completing the sale aforesaid, and all payments which may have been made by them or him for taxes or assessments, as well as reasonable compensation for their or his own services, it shall be lawful for the said trustees or trustee, and it shall be their or his duty, to apply the proceeds of such sale to the payment of the principal of such of the said bonds as may be at that time unpaid, whether or not such principal shall have, by the terms of said bonds, previously become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without dis-

crimination or preference as between principal and accrued
242 and unpaid interest, but ratably to the aggregate amount of
such unpaid principal and accrued and unpaid interest, and to the persons holding the bonds and coupons, respectively, evidencing the right to such principal and interest, without discrimination or preference between them; and if, after payment of said bonds and all interest thereon in full, a surplus shall remain, to pay over such surplus to the said party of the first part, its successors or assigns, or as any court of competent jurisdiction shall order.

And it is hereby declared and agreed, that the receipt or receipts of the said trustees or trustee shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold as aforesaid, for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not after payment thereof, and having such receipt, be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication or non-application of such purchase-money, or of any part thereof, or be obliged to inquire into the necessity, expediency, or authority of or for any such sale.

Article 4. At any sale of the railroad and property aforesaid, or of any part thereof, whether such sale be made by virtue of the power hereinbefore granted or by judicial authority, the trustees hereunder may bid for and purchase, or cause to be bid for and purchased, the property so sold, or any part thereof, in behalf of all the holders of bonds secured by this instrument and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price if but a portion of said property shall be sold, and, if the entire railroad and property hereby mortgaged shall be sold, then at a price not exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon and the expenses of such sale.

Article 5. In case default shall be made in the payment of any semi-annual installment of interest on any of the said bonds, when such interest shall become payable according to the tenor of said
bond, or of any coupon thereto annexed, the said coupon
243 having been presented, and payment of the interest therein
specified having been demanded, and such installment of interest shall remain unpaid and in arrear for the period of one year after the same shall have become payable and been demanded as aforesaid, the principal of each of the bonds secured hereby shall, at the option of the trustee hereunder, become and be immediately due and payable; but a majority in interest of the holders of all the said bonds then outstanding shall have the power, by an instrument in writing under their hands and seals, to instruct the trustees to declare the said principal to be due, or to waive the right so to declare, on such terms and conditions as such majority in interest shall prescribe, or to annul or reverse the declaration of any option by the trustees in the premises: Provided always, that no act or omission of the trustees, or of the bondholders, shall ex-

tend to or affect any subsequent default, or impair the rights resulting therefrom.

Article 6. The trustees shall have full power, in their own discretion, upon the written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, to any person designated by the said party of the first part, its successors or assigns, or to release from the lien and operation of these presents, in such manner as such trustees shall be advised, any part of the said premises which, in the judgment of the said trustees, shall not be necessary for use in connection with the said portion of said railroad, and which shall have been acquired or held for stations, depots, shops, or other buildings, or for a supply of fuel, gravel, or other material, and also to convey or release as aforesaid, on like request, any lands not occupied by the track which may become disused by reason of a change of the location of any station-house, depot, shop, or other building connected with the said Central division of said railroad, and such lands occupied by the track and adjacent to such station-house, depot, shop, or other building as the railroad company may deem it expedient to disuse or abandon by reason of such change; and to consent to any such change, and to such other changes in the location of the track, or of any depot or other building, as in their judgment shall have become ex-
244 pedient, and to make and deliver the instruments necessary or proper to carry the same into effect: Provided always, that any and all lands which shall be required for permanent use, in substitution for any so released, shall be conveyed to the trustees upon the trusts of these presents. And the trustees shall, also, have full power to allow the said party of the first part, its successors or assigns, from time to time, to dispose, according to its or their discretion, of such portions of the equipment, machinery, and implements which shall be at any time held or acquired for the use of the said Central division of said railroad as shall have become unfit or undesirable for such use: Provided always, that any new equipment, machinery, or implements, which may be acquired in substitution for any so released, shall become subject to the lien and operation of these presents.

Article 7. The trustees shall convey, by way of release or otherwise, to any party or parties designated by the said party of the first part, its successors or assigns, or, release from the lien and operation of these presents in such manner as such trustees may be advised, any and all lands granted or conveyed by this indenture, or expressed or intended so to be, not being a part of said railroad, nor required for the convenient use and operation thereof, which shall or may be hereafter sold by the said party of the first part, its successors or assigns, in conformity with the provisions of this instrument: Provided, that such lands shall not be sold by the said party of the first part, its successors or assigns, at less than the appraised value thereof, according to the appraisement thereof delivered to said trustees, without the consent in writing of said trustees, and that conveyances and releases shall not be executed by the trustees unless the net proceeds of the sales of the lands so sold shall

be paid over to them by the said party of the first part, its successors or assigns, or by the purchaser of such lands, to be by said trustees applied to the payment of interest on said bonds, and the purchase and cancellation thereof, as in article eighth of these presents set forth.

And it is further declared and agreed, that the bonds secured hereby shall be received as cash at their par value, and ac-
245 crued interest, by the said party of the first part, its successors and assigns, in payment for any of said lands which may be sold by said party of the first part, its successors or assigns.

Article 8. The net proceeds of all sales by the said party of the first part, its successors or assigns, of the aforesaid lands hereby mortgaged, shall be paid over by the said party of the first part, its successors or assigns, immediately upon receipt thereof, or within a reasonable time thereafter, to the trustees under these presents; and the same shall be by said trustees applied semi-annually, first, to the payment of the interest on the said bonds, if the same should not be paid from other sources; and, secondly, to the purchase and cancellation of said bonds, if the same can be purchased at not exceeding a premium of ten per cent. upon the par value thereof, with the interest accrued thereon: Provided, that, preparatory to such purchases of bonds, the trustees shall advertise once in each week, for three weeks, in one or more of the daily newspapers published in the cities of New York and Boston, for bonds to be sold, and shall make such purchases of bonds at the lowest price or prices at which the said bonds may be offered, pursuant to such advertisement, or at such lower price or prices as the said trustees may, with reasonable diligence, be able to obtain the same for at public or private sale; and if the said trustees shall not be able to obtain said bonds at not exceeding the rate aforesaid within thirty days after the expiration of such advertisement, the said moneys shall be deposited by the said trustees in some safe depository, approved by the board of directors of said company, in either of the cities of New York or Boston, and thereafter the said moneys, with all accumulations of interest thereon, which may come within the disposal of said trustees, shall be applied, from time to time, to the purchase of said bonds, at not exceeding the rate aforesaid, whenever the same can be obtained at not exceeding such rate: And provided further, that the said party of the first part may at any time authorize the said trustees to purchase said bonds at a higher rate than the rate aforesaid, in the discretion of said trustees.

Article 9. The trustees under these presents shall at all
246 times be authorized to employ and to appoint such clerks, assistants, agents, and attorneys as they shall reasonably require to discharge any duty under these presents in relation to the sale of any of the lands aforesaid, and all clerks, assistants, and agents, and attorneys so necessarily or properly employed or appointed, shall be paid by the party of the first part, its successors or assigns; and the said trustees shall be fully authorized to constitute and appoint an agent or attorney to execute conveyances, releases, or other instruments necessary and proper to be executed by them

to release from the lien and operation of these presents any of the said lands which shall be sold as herein authorized, and to act generally in behalf of said trustees, in respect thereto, which agent may be removed by said trustee-, in their discretion, and another appointed in his place; and all instruments executed and acts done by such agent, within the scope of his authority, in respect to said lands, shall be as legal and valid as if executed or done by the said trustees personally.

Article 10. The said party of the first part shall cause the lands aforesaid to be carefully valued and appraised in such divisions or parcels as shall seem to it most expedient for the purpose of selling the same, and in such valuation and appraisement all lands containing, or supposed to contain, minerals, shall be distinguished from those which are valued as agricultural, and true copies of such valuation and appraisement shall be made, one of which copies, certified by the president of the said party of the first part, under the corporate seal thereof, shall be deposited with each of the said trustees, but the said valuation and appraisement may from time to time be changed in regard to the whole or in part of the lands included therein, provided a copy of such new valuation shall be deposited as aforesaid.

And it is hereby declared and agreed, that the said party of the first part, and its successors, shall be entitled to contract for the sale of said lands, or any part or parcel thereof not occupied by the track of said railroad, or necessary to the right of way, or necessary or used for the purposes of depots, stations, station-houses, car-houses, freight-houses, wood-houses, machine shops or other
247 shops, or any other purpose incident to the operation of said railroad, or necessary for the proper transaction of the business thereof, at the appraised value aforesaid, and may sell the same partly on credit; provided always, that before conveyance of any lands so sold shall be made to the purchaser, any amount of purchase-money remaining unpaid shall be secured by a purchase-money mortgage upon the premises sold, which purchase-money mortgage shall be duly assigned to the trustees under these presents, at or before the delivery of such conveyance or release.

Article 11. If the said party of the first part shall well and truly pay the principal of the said bonds, when the same shall become payable, and all interest thereon, as such interest shall mature, according to the tenor of said bonds, respectively, and the terms of the coupons thereto annexed, then, and in that case, all the estate, right, title, and interest of the said parties of the second part, and of the survivor of them, and of their and his successors and successor in the trust by these presents created, shall cease, determine, and become void, otherwise the same shall be and remain in full force and virtue.

Article 12. In case default shall be made in the payment of any interest to accrue on any of the said bonds, and such interest shall remain unpaid and in arrear for the period of one year after the same shall have been demanded, or in case default shall be made in the payment of the principal of any of the said bond, it shall be the

duty of the trustees under these presents, upon a requisition made upon them in writing, signed by holders of a majority in interest of the said bonds, and upon adequate indemnity against all cost, expenses, and liabilities to be by said trustees incurred, to proceed to enforce the rights of the bondholders under these presents, either by the exercise of the powers granted by articles second and third of these presents, or by a suit or suits in equity or at law, in aid of the execution of such powers, or otherwise, as the said trustees, being advised by counsel learned in the law, shall deem most effectual for the purpose of enforcing such rights.

Article 13. It is mutually agreed by and between the
248 parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee under these presents for the time being, whether such trustees or trustee be the parties of the second part, or any successors or successor of the said parties of the second part, or either of them, in said trust; and whenever a vacancy shall exist, to mean the surviving or continuing trustee. And it is further mutually agreed, that the said trustees shall be entitled to just compensation for all services hereafter to be rendered by them in this trust, which compensation shall be paid by the said party of the first part, its successors or assigns; that the said trustees shall not be responsible for the default or misconduct of each other or of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care; that the said trustees, or either of them, may resign, and be discharged from the trust created by these presents, by giving notice in writing to the party of the first part, or its successors, three months before such resignation shall take effect, or such shorter notice as the said party of the first part, or its successors, may accept; that the said trustees, or either of them, may be removed by the holders of a majority in interest of the whole amount of said bonds, by an instrument in writing signed by such majority in interest, provided, that such removal shall be subject to the approval of, and shall not take effect until approved by the board of directors of the said party of the first part; that in case at any time hereafter the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided, or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the other of the parties of the second part, or by the remaining trustee at the time being, by an instrument in writing under his hand and seal, and so, from time to time, in case of the death, resignation, removal, or unfitness to act of either of the trustees at the time being, his place may be filled in like manner by the remaining trustee. But in case of neglect to appoint such new trustee at any time when a vacancy shall occur, the party of the first part may, by an instrument in writing, authorized by its board of directors and duly executed under its corporate seal, make such appointment; and
249 it is hereby covenanted and agreed that any new trustee appointed as aforesaid shall immediately, upon his appointment, and without any further act, deed, or conveyance, become and be

vested with all of the estate, trust, rights, powers, and duties of the trustee in whose place he shall have been appointed; but nevertheless the respective parties hereto, and their respective successors and assigns, shall and will upon request make, execute, and deliver all such releases, conveyances, and assurances as shall be appropriate to vest in and confirm and assure to such new trustee such estate, trust, rights, powers, and duties, according to the intent above expressed.

And the said party of the first part, for itself, its successors and assigns, hereby, for the consideration aforesaid, further covenants, promises, and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors, in the trust by these presents created, that the said party of the first part, its successors or assigns, shall and will well and truly pay, or cause to be paid, unto the holder or holders of said bonds, the principal and interest thereof as such principal and interest shall become payable, according to the tenor of said bonds, respectively, and the terms of the coupons thereto annexed.

And the said party of the first part, for itself, its successors and assigns, in consideration of the premises, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust created by these presents, that whenever and as often as the said party of the first part, its successors or assigns, shall hereafter acquire any lands granted by the said act of Congress to aid in the construction of the said division of said railroad and branches, or any other property, rights, or franchises connected with said division of said railroad and branches, the said party of the first part, its successors and assigns, shall and will acquire, possess, and hold the same, and every part and parcel thereof, upon and subject to the trusts of this indenture, until conveyance thereof, in pursuance of the covenant next hereinafter contained, shall be duly made and delivered to the said parties of the second part, or the survivor of them, or their or his successors in the trust by these presents created.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust created by these presents, that the said party of the first part, its successors and assigns, shall and will from time to time, and at all times hereafter, and as often as thereunto requested by the trustees under this indenture, execute, deliver and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto such trustees, upon the trusts herein expressed, all and singular the said division of said railroad and the branches thereof, and the lands and premises aforesaid, as by the said trustees, or by their counsel learned in the law, shall be reasonably advised or required.

In witness whereof, the said Atlantic and Pacific Railroad Company, party of the first part, has caused its corporate seal to be

hereto affixed, and the same to be attested by the signa-
[SEAL.] tures of its president and treasurer; and the said Oliver Ames and Charles F. Choate have hereunto set their hands and seals to evidence the acceptance of the trust hereby created, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By URIEL CROCKER, *President.*

WM. A. HAYES, *Treasurer.*

OLIVER AMES. [SEAL.]
CHARLES F. CHOATE. [SEAL.]

Sealed and delivered in presence of—

HORATIO ADAMS.
SAMUEL JENNISON.

STATE OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

I, Samuel Jennison, a notary public, in and for said
251 county of Suffolk, duly commissioned and sworn, and residing in the city of Boston, do certify that in said Boston, on this eleventh day of November, in the year of our Lord one thousand eight hundred and seventy-one, personally appeared before me, Uriel Crocker, president, and Wm. A. Hayes, treasurer, of the Atlantic and Pacific Railroad Company, the corporation described in the foregoing instrument, and Oliver Ames and Charles F. Choate, all personally known to me to be the same persons who have executed said instrument, the said Uriel Crocker and Wm. A. Hayes, on behalf of said Atlantic and Pacific Railroad Company, a party, and said Oliver Ames and Charles F. Choate as parties thereto, and they severally acknowledged to me that they executed the same, and that the same was the free and voluntary act and deed of said company, executed by them, respectively, for the consideration, uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my notarial seal this 11th day of November, A. D. 1871.

SAMUEL JENNISON,
Notary Public in and for Suffolk County.

(Indorsement:) Recorded vol. 2, Land Grant Records, page 141. Interior Department. Dated Nov. 1st, 1871. The Atlantic and Pacific Railroad Company to Oliver Ames and Charles F. Choate, trustees. First mortgage, railroad and land grant—Central division. Received by trustees November 15th, 12.15 p. m. C. F. Choate, for trustees.

EXHIBIT 11 A.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress, approved April 20th, 1871.

252 In testimony whereof, I have hereunto subscribed [SEAL.] my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

This indenture, made the first day of November, in the year of our Lord one thousand eight hundred and seventy-one, between the Atlantic and Pacific Railroad Company, a corporation duly formed and organized under an act of the Congress of the United States, party of the first part, and Oliver Ames and Charles F. Choate, both of the city of Boston, and Commonwealth of Massachusetts, parties of the second part:

Whereas, the said Atlantic and Pacific Railroad Company is a corporation duly formed and organized under an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866:

And whereas, in and by said act of Congress certain lands were granted to the said party of the first part to aid in the construction of such railroad and telegraph line from Missouri and Arkansas to the Pacific coast, it being therein provided as follows, to wit:

SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said rail-

253 road whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been

granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

And whereas, by an act of the Congress of the United States, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit:

254 Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms, as its directors may deem advisable; and to secure said bonds the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations, as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior. Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

And whereas, the said party of the first part, for the purpose of obtaining means to continue the construction and equipment of the

said railroad and telegraph line, and for its other lawful purposes, has resolved to make, issue, and negotiate its bonds to an amount not exceeding twenty thousand dollars for each mile of such parts of its railroad and the branches thereof as are located between the western boundaries of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of the State of Texas and the River Rio Grande, to consist of a series of bonds, for one thousand dollars each, numbered consecutively, from number 1 (one) upwards, and of a series of bonds for five hundred dollars each, also numbered consecutively, from number 1 (one) upwards, and which bonds are to bear even date herewith, and, except as to the numbers and amounts thereof, are to be all of the same tenor and in the form following, that is to say:

255 No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Central division.

Land-grant Bond, Principal and Interest Payable in Gold.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted to Oliver Ames and Charles F. Choate, both of Boston, Massachusetts, or bearer, in the sum of — dollars, in gold coin of the United States of America, which the said Atlantic and Pacific Railroad Company hereby promises to pay to the said Oliver Ames and Charles F. Choate, or to the bearer hereof, in the gold coin aforesaid, on the first day of November, one thousand nine hundred and one, at the agency of said railroad company in the city of New York, together with interest thereon from the first day of November, one thousand eight hundred and seventy-one, at the rate of six per centum per annum, in like gold coin of the United States of America, payable at the maturity of this bond, or as may hereafter be provided by a resolution of the directors of said company, such interest being free from and without any deduction for any income or other tax, which now is, or hereafter may be, imposed upon the same by the Government of the United States, said company hereby agreeing to assume and pay any such tax.

This bond is one of an issue of bonds not exceeding twenty thousand dollars for each mile of such parts of the said company's railroad, and the branches thereof, as are located between the western boundary of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of said State of Texas and the River Rio Grande, consisting of a series of bonds for one thousand dollars each, numbered consecutively from number 1 (one) upwards, and of a series of bonds for
256 five hundred dollars each, numbered consecutively from number 1 (one) upwards, which bonds are all of even date, and of like tenor, except as to the number and amounts thereof, and the payment whereof is equally secured by a certain deed of trust or mortgage, bearing even date herewith, to the said Oliver Ames and Charles F. Choate, as trustees, duly executed and

delivered by the said Atlantic and Pacific Railroad Company, whereby the said company mortgages to said trustees all the right, title, and interest which the said company now has, or may hereafter acquire, of, in, and to all of those portions of the lands coterminous with said parts of said railroad and its branches, and granted or intended to be granted to it by a certain act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, which are distant twenty miles from the said parts of said railroad and its branches on either side thereof, and extend to the distance of forty miles therefrom on each side thereof.

It is provided in the said deed of trust or mortgage, that the net proceeds of the sale of any of the lands included therein, which shall be sold by the said railroad company, shall be paid to the trustees under said deed, to be applied to the payment of the accrued interest upon the said bonds (if the same shall have been provided to be paid by a resolution of the directors of the said company), or to the purchase and cancellation of the said bonds at the times, in the manner, and upon the terms expressed in said deed; and it is further provided in said deed that said bonds shall be receivable at par in payment for any and all such lands which shall be sold as aforesaid; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery, or by transfer upon the books of said railroad company, at the option of the holder.

After a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer, except upon the books of the said railroad company, shall be valid, unless the preceding transfer shall have been to bearer, and transferability by delivery thereby restored; but this bond shall continue sus-
257 ceptible of successive registrations and transfers to bearer, as aforesaid, at the option of the holder.

This bond shall not become valid or obligatory until it shall have been authenticated by a certificate indorsed hereon, and duly signed by the trustees, or by the successors of said trustees, in the trust created by said deed.

In witness whereof, the said Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and the same to be attested by the signatures of its president and treasurer this first day of November, A. D. 1871.

—— ——, *President.*

—— ——, *Treasurer.*

And whereas, for the purpose, among other things, of identifying the said bonds as those which are entitled to the benefit of the security afforded by these presents, each of them is to have indorsed upon it a certificate signed by the said parties of the second part, or by their successors in the trusts, hereby created in the following words, that is to say: "We hereby certify that this is one of the issue of bonds mentioned in the mortgage executed by the Atlantic and Pacific Railroad Company to us, within mentioned, dated Novem-

ber 1st, 1871, and intended to be secured thereby." And each of the said bonds is to have affixed to it the requisite amount of stamps required by the internal revenue laws of the United States.

And whereas, the said party of the first part being about to issue and negotiate some of the said bonds for the purpose aforesaid, have also resolved to secure the principal and interest of all of the same, or of such of them as may be from time to time issued or negotiated, by a mortgage of the premises hereinafter described, and conveyed to the said parties of the second part in trust for the equal benefit of all of the persons and corporations who may at any time become the holders of any of the said bonds, without any preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same.

258 Now, therefore, this indenture witnesseth, that the said party of the first part, for and in consideration of the premises and of the sum of one dollar to it in hand duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and in order the better to secure the payment of the principal and interest of the said bonds, according to the tenor thereof, has granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, and transfer unto the said parties of the second part, as joint tenants, and not as tenants in common, and to the survivor of the said parties of the second part, and the heirs and assigns of such survivor, all of the right, title, and interest which the said party of the first part, by reason or for, or in respect of the construction of those parts of the Central division of its railroad and telegraph line, or any part or branch thereof, which are or shall be located between the western boundary of the States of Missouri and Arkansas and the eastern boundary of the State of Texas, and between the western boundary of the said State of Texas and the River Rio Grande, now has, or shall, or may hereafter, at any time have or acquire of, in, and to all those portions of the lands situated in the Indian Territory or the Territory of New Mexico coterminous with or appurtenant to, said parts of said Central division of said railroad and its branches, and granted, or intended to be granted, to the said party of the first part, as aforesaid, which are or shall be distant twenty miles from the said parts of said railroad and its branches, on each side thereof, and which do, or shall extend to the distance of forty miles from said parts of said railroad and its branches, on each side thereof: and also, all of the right, title, and interest of the said party of the first part of, in, and to any and all lands, wherever situated, which under and by virtue of the provisions of the said above-recited third section of the said act of Congress the said party of the first part is authorized to select, under the direction of the Secretary of the Interior, in lieu of any of the said lands hereinbefore referred to, of which the said party of the first part has been, or may be deprived by reason of the same having been granted, sold, reserved, occupied for homestead settlers or pre-empted, or otherwise disposed of, as provided in the

259 said third section of the said act of Congress, approved July 27th, 1866, together with all and singular the tenements,

hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part and parcel thereof, with the appurtenances:

To have and to hold the said lands and premises hereinbefore granted unto the said parties of the second part, as joint tenants, and not as tenants in common, and unto the survivor of the said parties of the second part, his heirs and assigns; in trust for the security and benefit of all and every the person or persons or bodies corporate who shall be, or at any time become the holder or holders of the said bonds hereby intended to be secured, or of such of them as shall be issued and negotiated by the said party of the first part, without preference to the holder of any of the said bonds over any of the others by reason of priority in the time of the issuing or negotiating of the same, upon the trusts and to and for the uses and purposes hereinafter expressed, that is to say:

Article 1. In case default shall be made in the payment of the principal of said bonds, or any of them, or of the interest thereon as therein provided, it shall be lawful for the trustees under these presents personally, or by attorneys or agents, to enter into and upon all and singular the lands and premises aforesaid, and take actual possession of the same; and after such entry, or other entry, or without entry, to sell and dispose of all and singular the said lands and premises, in one or more parcels, as the said trustees shall deem most expedient, and all right, title, interest, benefit, and equity of redemption of the said party of the first part, its successors or assigns therein, at public auction in the city of Boston, or in the city of New York, or in the city of St. Louis, or in any county or town in which the said lands or any part thereof may be situate: Provided, that, preparatory to such sale or sales, the said trustees shall give public notice of the time and place thereof, by
260 advertisement, published not less than once in each week, for six successive weeks, in one newspaper of good circulation in each of the cities of Boston, New York, and St. Louis, and in one newspaper (if any such there shall then be) published in the county in which the said trustees shall make such sale. And the said trustees shall be and are hereby fully authorized and empowered, after such publication, to make such sale or sales, at the time and place mentioned in such advertisement, or to adjourn the same from time to time in their discretion, and, if so adjourning, to make the same, without further notice, at the time to which the same may be so adjourned, and at the place mentioned in the advertisement of sale; and as the attorneys of the party of the first part hereto, for that purpose by these presents duly authorized, constituted, and appointed, or otherwise, to execute and deliver to the purchaser or purchasers at any such sale, or to his or their assigns, a good and sufficient deed or deeds of conveyance in the law for the lands which shall be sold as aforesaid to such purchaser or purchasers, whereby

the same shall be granted and assured in fee-simple to such purchaser or purchasers, or to his or their heirs or assigns; and any sale made as aforesaid shall be a perpetual bar, both in law and equity, against the said party of the first part hereto, its successors and assigns, and against any and all persons claiming or to claim the premises thus sold, or any part thereof, by, from, through, or under the said party of the first part, its successors or assigns.

And it is hereby further declared and agreed, that it shall be lawful for the said trustees to deduct from the proceeds of such sale all expenses connected therewith—including proper compensation for their own services, and the fees and charges of any attorneys and counsel by them employed in the premises—and also any advances or liabilities properly made or incurred by them (the said trustees) in connection with the said lands and premises, or any part or parcel thereof, while the said lands or premises shall have been in their possession, and also the amount of any taxes and assessments upon the said premises, or any part thereof; and, after making the deductions aforesaid, it shall be
lawful for the said trustees, and it shall be their duty, to apply
261 the balance of the said proceeds of sale, together with any other moneys, if any, received by them in connection with said premises, to the payment of the principal of said bonds, and of the interest accrued thereon, ratably and without discrimination or preference as between principal and interest, and without regard to the time of the actual issue of said bonds; and if, after paying in full the principal of said bonds, and all interest accrued thereon, a surplus of said moneys shall remain, to pay over such surplus to the said party of the first part, its successors or assigns, or as any court of competent jurisdiction shall direct.

And it is hereby declared and agreed, that the receipt or receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers at any such sale, for the purchase-money of any lands which shall be sold as aforesaid, and that such purchaser or purchasers, after paying such purchase-money and receiving such receipt, shall not be liable to see to the application of such purchase-money, or be in any manner whatsoever answerable for any misapplication or non-application thereof.

Article 2. At any sale of the lands aforesaid, or any part thereof, whether the same be made in virtue of the power herein granted or by judicial authority, if such sale would discharge or impair the lien created by these presents, the said trustees shall be and they are hereby authorized and empowered to bid for and purchase, in behalf of all the holders of the bonds secured by this instrument which shall be then outstanding, the property so sold, or any part thereof, in the proportion of the respective interests of such bondholders: Provided, that nothing herein contained shall authorize the said trustees to bid on behalf of all the holders of said bonds a sum exceeding the aggregate amount of said bonds then outstanding, with the interest accrued thereon and the expenses of such sale, for the entire property then held upon the trusts of this indenture,

or an amount reasonably proportionate thereto, for any part of the said property.

Article 3. The net proceeds of the sales of any of the lands hereinbefore granted or conveyed, or expressed or intended so to be,
262 which shall at any time hereafter be sold by the said party of the first part, its successors or assigns, while the said bonds or any thereof remain outstanding, shall be paid over by the said party of the first part, its successors or assigns, upon the receipt thereof, or within a reasonable time thereafter, to the trustees under this indenture, and the same, together with all interest thereon which shall come within the disposal of the said trustees, shall be applied, semi-annually, first, to the payment of the accrued interest upon the said bonds (if the same shall have been provided to be paid by a resolution of the directors of the said party of the first part, and shall remain unpaid), and, secondly (or if there shall have been no resolution of the said directors providing for the payment of such interest) to the purchase and cancellation of the then outstanding bonds secured by these presents, if the same can be purchased at not exceeding a premium of ten per cent. upon the par value thereof, with the interest accrued thereon: Provided, that preparatory to such purchases of bonds, the trustees shall advertise, once in each week for three weeks, in one or more of the daily newspapers published in the cities of New York and Boston, for bonds to be sold, and shall make such purchases of bonds at the lowest price or prices at which the said bonds may be offered, pursuant to such advertisement, or at such lower price or prices as the said trustees may, with reasonable diligence, be able to obtain the same for, at public or private sale; and if the said trustees shall not be able to obtain the *same for, at public or private sale; and if the said trustees shall not be able to obtain* said bonds at not exceeding the rate aforesaid within thirty days after the expiration of such advertisement, the said moneys shall be deposited by the said trustees in some safe depository, approved by the board of directors of said company, in either of the cities of New York or Boston, and thereafter the said moneys, with all accumulations of interest thereon which may come within the disposal of said trustees, shall be applied from time to time to the purchase of said bonds, at not exceeding the rate aforesaid, whenever the same can be obtained at not exceeding such rate. The said party of the first part may at any time authorize the purchase of said bonds at a higher rate than the rate aforesaid,
263 but the purchase thereof at such higher rate shall be within the discretion of said trustees notwithstanding such authorization.

Article 4. The trustees under these presents shall, at all times, be authorized to employ and appoint such clerks, assistants, agents, and attorneys as they shall reasonably require, to discharge any duty under these presents in relation to the lands aforesaid, and all clerks, assistants, agents, and attorneys so necessarily or properly employed or appointed shall be paid by the party of the first part, its successors or assigns, from the proceeds of the sales of said lands; and the said trustees shall be fully authorized to constitute and ap-

point an agent or attorney to execute conveyances, releases, or other instruments necessary and proper to be executed by them to release from the lien and operation of these presents any of the said lands which shall be sold as hereinafter authorized, and to act generally in behalf of said trustees, in respect thereto, which agent may be removed by said trustees, in their discretion, and another appointed in his place; and all instruments executed and acts done by such agent, within the scope of his authority, in respect to said lands, shall be as legal and valid as if executed or done by the said trustees personally.

The said party of the first part shall cause the lands aforesaid to be carefully valued and appraised in such divisions or parcels as shall seem to it most expedient for the purpose of selling the same, and in such valuation and appraisement all lands containing, or supposed to contain, coal or iron, shall be distinguished from those which are valued as agricultural, and true copies of such valuation and appraisement shall be made, one of which copies, certified by the president of the said party of the first part, under the corporate seal thereof, shall be deposited with each of the said trustees, but the said valuation and appraisement may, from time to time, be changed in regard to the whole or any part of the lands included therein, provided a copy of such new valuation shall be deposited as aforesaid.

And it is hereby declared and decreed, that the said party of the first part, and its successors, shall be entitled to contract for the sale of said lands, or any part or parcel thereof, at the appraised
264 value aforesaid, and may sell the same partly on credit: Provided, that before conveyance of any lands so sold shall be made to the purchaser, any amount of purchase-money remaining unpaid shall be secured by a purchase-money mortgage upon the premises sold, which purchase-money mortgage shall be duly assigned to the trustees under these presents, at or before the delivery of such conveyance or release.

Article 5. The trustees shall convey, by way of release or otherwise, to any party or parties designated by the said party of the first part, its successors or assigns, or release from the lien and operation of these presents in such manner as such trustees may be advised, any and all lands granted or conveyed by this indenture, or expressed or intended so to be, which shall or may be hereafter sold by the said party of the first part, its successors or assigns: Provided, that such lands shall not be sold by the said party of the first part, its successors or assigns, at less than the appraised value thereof, according to the appraisement theretofore delivered to said trustees, without the consent in writing of said trustees, and that conveyances and releases shall not be executed by the trustees unless the net proceeds of the sales of the lands so sold shall be paid over to them by the said party of the first part, its successors or assigns, or by the purchaser of such land, to be by said trustees applied, as in article third of these presents is set forth.

And it is hereby further declared and agreed, that the bonds secured hereby shall be received as cash at their par value and ac-

crued interest by the said party of the first part, its successors and assigns, in payment for any of said lands hereby mortgaged which may be sold by said party of the first part, its successors or assigns.

Article 6. If the said party of the first part shall well and truly pay the principal of each of the said bonds when the same shall become payable, and all interest thereon, as such interest shall mature, according to the tenor of such bond, then and in that case, that is to say, after the payment of said bonds and all interest thereon in full, all the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust by these
265 presents created, shall cease, determine, and become void, otherwise the same shall be and remain in full force and virtue.

Article 7. It is mutually agreed by and between the parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee under these presents for the time being, whether such trustees or trustee be the parties of the second part, or the survivor of them, or any successors or successor of the said parties of the second part, or either of them, in said trust; and whenever a vacancy in the trust shall exist, the said word "trustees," as used herein, shall be construed to mean the surviving or continuing trustee. And it is further mutually agreed, that the said trustees shall be entitled to just compensation for all services hereafter to be rendered by them in this trust, which compensation shall be paid by the said party of the first part, its successors or assigns, from the proceeds of the sales of the lands hereby mortgaged; that the said trustees shall not be responsible for the default or misconduct of each other or of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care; that the said trustees, or either of them, may resign, and be discharged of the trust created by these presents, by giving notice in writing to the party of the first part, or its successors, three months before such *registration* shall take effect, or such shorter notice as the party of the first part, or its successors, may accept; that the said trustees, or either of them, may be removed by the holders of a majority in interest, of the whole amount of said bonds, by an instrument in writing, signed by such majority in interest: Provided, that such removal shall be subject to the approval of, and shall not take effect until approved by the board of directors of the said party of the first part; that in case at any time hereafter the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided or otherwise, or shall become incapable or unfit to act in said trust, a successor of such trustee shall be appointed by the other of the parties of the second part, or by the remaining trustee, at the time being, by an instrument in writing under his hand and seal, and so, from time to time, in
266 case of the death, resignation, removal, or unfitness to act of either of the trustees, at the time being, his place may be filled in like manner by the remaining trustee. But in case of neglect to appoint such new trustee at any time when a vacancy shall occur, the party of the first part may by an instrument in

writing, authorized by its board of directors, and duly executed under its corporate seal, make such appointment, and it is hereby covenanted and agreed, that any new trustee appointed as aforesaid shall immediately, upon his appointment, and without any further act, deed, or conveyance, become, and be vested with all of the estate, trust, rights, powers, and duties of the trustee in whose place he shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will upon request, make, execute, and deliver all such releases, conveyances, and assurances as shall be appropriate to vest in and confirm and assure to such new trustee such estate, trust, rights, powers, and duties according to the intent above expressed.

And the said party of the first part, for itself, its successors and assigns, hereby, for the consideration aforesaid, further covenants, promises, and agrees, to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust by these presents created, that the said party of the first part, its successors or assigns, shall and will well and truly pay unto the holder or holders of said bonds the principal and interest thereof, as such principal and interest shall become payable according to the tenor, of said bonds, respectively.

And the said party of the first part, for itself, its successors and assigns, in consideration of the premises, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust created by these presents, that whenever and as often as the said party of the first part, its successors or assigns, shall hereafter acquire any of the said lands intended to be mortgaged by these presents, the said party of the first part, its successors and assigns, shall and will acquire, possess, and hold the same, and every part and parcel thereof, upon and subject to the trusts of this indenture, until conveyance thereof, in
267 pursuance of the covenant next hereinafter contained, shall be duly made and delivered to the said parties of the second part, or the survivor of them, or their or his successors in the trust by these presents created.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, and their and his successors in the trust created by these presents, that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the said parties of the second part, or the survivor of them, or their or his successors in the trust hereby created, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the said parties of the second part, or the survivor of them, or their or his successors in said trust, upon the trusts herein expressed, all and singular the lands hereinbefore mentioned or described, as by them or him, or by their or his counsel learned in the law, shall be reasonably advised, devised, or required.

In witness whereof, the said Atlantic and Pacific Railroad Com-

pany, party of the first part, has caused its corporate seal [SEAL.] to be hereto affixed, and the same to be attested by the signatures of its president and treasurer; and the said Oliver Ames and Charles F. Choate have hereunto set their hands and seals to evidence the acceptance of the trust hereby created, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By URIEL CROCKER, *President.*

WM. A. HAYES, *Treasurer.*

OLIVER AMES. [SEAL.]
CHARLES F. CHOATE. [SEAL.]

Sealed and delivered in the presence of—

HORATIO ADAMS.
SAMUEL JENNISON.

268 STATE OF MASSACHUSETTS, } *ss:*
County of Suffolk, City of Boston, }

I, Samuel Jennison, a notary public, in and for said county of Suffolk, duly commissioned and sworn, and residing in the city of Boston, do certify that in said Boston, on this eleventh day of November, in the year of our Lord one thousand eight hundred and seventy-one, personally appeared before me, Uriel Crocker, president, and Wm. A. Hayes, treasurer, of the Atlantic and Pacific Railroad Company, the corporation described in the foregoing instrument, and Oliver Ames and Charles F. Choate, all personally well known to me to be the same persons who have executed said instrument, the said Uriel Crocker and Wm. A. Hayes, on behalf of said Atlantic and Pacific Railroad Company, a party, and said Oliver Ames and Charles F. Choate, as parties thereto, and they severally acknowledged to me that they executed the same, and that the same was their free and voluntary act and deed, and said Uriel Crocker and Wm. A. Hayes, that the same was the free and voluntary act and deed of said company, executed by them respectively, for the consideration, uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and [SEAL.] affixed my notarial seal this 11th day of November, A. D. 1871.

SAMUEL JENNISON,
Notary Public in and for Suffolk County.

(Indorsement:) Recorded vol. 2, Land Grant Records, page 196. Dated Nov. 1st, 1871. The Atlantic and Pacific Railroad Company to Oliver Ames and Charles F. Choate, trustees. Land-grant mortgage, Central division. Received by trustees November 15th, 1871, 12.15 p. m. C. F. Choate, for trustees.

EXHIBIT 11 B.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

269 Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name, and [SEAL.] caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

Atlantic and Pacific Railroad Company.

First Mortgage, Western Division.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, party of the second part, witnesseth:

That whereas, the party of the first part, under the act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip, and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the Pacific ocean, and hereinafter described and referred to as the "Western division."

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31st, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to complete said Western division as rapidly as practicable; and that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka
270 and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards until the first day of October, A. D.

1910, and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company, and said St. Louis and San Francisco Railway Company, have executed the contract of guaranty indorsed hereon.

And whereas, said act of Congress provides as follows:

SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than
271 ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready

for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and continuous with said completed section of said road. And from time to time, whenever
272 twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:"

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one
273 thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Coupon Six per Cent. Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, together with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of January and July, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said
274 trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company, under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company, at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate
275 indorsed thereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And said registered bonds are of the tenor and form following namely:—

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the rail-
276 road company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, con-

veying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:—

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate
277 indorsed thereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By THOS. NICKERSON, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be indorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, indorsed upon said mortgage.

—— ——, *Trustee.*

And whereas, the party of the first part, being about to issue some of said bonds, and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all of the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue, or of any other cause or thing whatsoever, and the party of the
278 second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign, and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part of, in, and to the same and any and every part thereof, with the appurtenances:

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of
279 said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these pres-

ents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half with the Boston Safe Deposit and Trust Company, of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approve, to the credit of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining, and operating said Western division of the Atlantic and Pacific Railroad Company, and for the payment of the interest maturing on such bonds, until the completion of said division to the Pacific coast, or until said party of the second part shall, by a contract with any other road, form a through line, properly equipped, to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division, or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part, during construction, monthly accounts, showing the application of said proceeds; and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion, from time to time sell the lands received from the United States
280 under said first-named act of Congress, and any — all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit secured by a lien upon the land sold, and the party of the second part, its successor or successors in said trust, shall, upon demand, from time to time, release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable, provided, however, that the appointment of the land commissioner shall be made by the party of the first part, with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable; and such certificate shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Com-

pany of New York, trustee, or its successor or successors in said trust, and used solely—

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds, and

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mort-
281 gage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings, or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain, and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights, and property of every kind, with the appurtenances included in this mortgage, and collect, receive, and use the rents, tolls, issues, income, and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then, and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust,

may, personally or by its, his, or their attorney or agent,
282 enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property, and appurtenances of every description belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and

collect and receive the rents, tolls, issues, income, and profits thereof, and shall sell and dispose of said lands and land grants, and after paying all taxes, assessments, and liens superior to the lien created by these presents, and all proper expenses of constructing, operating, and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

1. To the payment of interest on said first-mortgage bonds.

2. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third, in amount, of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due, the said remainder shall be applied to payment of interest and principal without preference.

3. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest bearing indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises, and property of every kind pertaining to said Western division, and all
283 additions thereto and extensions thereof, and reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims, and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding, but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth, in amount of said first-mortgage bonds outstanding with indemnity for expenses liable to be incurred, shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools,

machinery, supplies, and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago, and San Francisco, not less than three times a week for six successive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance, made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part, and all persons claiming through, by, or under the said party. The party of the second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under
284 any obligation to inquire into the necessity, expediency, or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law, for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipment, and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his, or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding, at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth, in amount, of all said bonds outstanding; and any vacancy in the trusteeship hereby
285 created, occasioned by the dissolution, death, resignation, re-

moval, incapacity, or refusal to *the* act of the present or any succeeding trustee, may be filed by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and powers before vested in his or its predecessor under this mortgage and upon the trusts, agreements, and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge, and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances, and assurances in the law, for the better assuring to such successor or successors the said estates, rights, titles, properties, interests, and powers, as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis, and San Francisco, twice each week, for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled, in person or by attorney, to vote in proportion to the amounts held by them.

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Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys, or servants in the discharge of said trust; and the just and reasonable charges of said trustee and its agents, attorneys, and servants, shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of

fact, or for any act or thing whatsoever done, suffered, or neglected by its or their agents, attorneys, servants, or employés, selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secre-
[SEAL.] tary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By THOS. NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

287 [SEAL.] UNITED STATES TRUST CO. OF NEW YORK,
By JOHN A. STEWART, *President.*

Attest: JAMES S. CLARKE, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

On this third day of August, A. D. 1880, before me, Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested, and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.] LEVI C. WADE.

COMMONWEALTH OF MASSACHUSETTS, *ss:*

SECRETARY'S DEPARTMENT,
BOSTON, *August 7th*, 1880.

I hereby certify, that on the 15th day of November, 1876, Levi C. Wade was appointed and commissioned, and on the 28th day of November, 1876, duly received the qualifying oaths thereunder, as a NOTARY public for the county of Suffolk, in the said Commonwealth, for the term of seven years from the date of said commission; and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court.

[SEAL.] In testimony of which I have hereunto affixed the seal of the Commonwealth.

HENRY B. PIERCE,
Secretary of the Commonwealth.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

288 On this ninth day of August, A. D. 1880, before me, came John A. Stewart, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in said city; that he is the president of the United States Trust Company of New York; that he knows the corporate seal of the said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation, by the like authority.

[NOTARIAL SEAL.] HENRY L. THORNELL,
Notary Public, New York Co.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify, that Henry L. Thornell, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument, and thereon written was, at the time of taking such proof and acknowledgement, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of the said court and county, the 9th day of August, 1880.

WM. A. BUTLER, *Clerk.*

Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agree-
289 ment under seal, dated January 31st, 1880, wherein, among other things, they agreed that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the

Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July, in the present year, and afterwards until the first day of October, A. D. 1910:

Now, therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally covenant and agree with the Atlantic and Pacific Railroad Company and the United States Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company, shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will contribute, ratably to the earnings hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five (25) per cent. of the gross amount of their said described earnings respectively during the six months ending on the first days of October and April, preceding the date of such coupons.

290 In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be attached hereto, and these presents to be [SEAL.] signed by their respective presidents, and attested by the secretary of the first-named and the assistant secretary of the last-named company, on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*

Attest: C. LITTLEFIELD, *Secretary.*

[SEAL.]

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By T. JEFFERSON COOLIDGE, *President.*

Attest: GEO. L. GOODWIN,
Assistant Secretary.

(Indorsement:) Recorded in Land Grant Record, vol. 2, page 343 and following, Sept. 18th, 1880. Compared by Arthur Martin, clerk.

EXHIBIT 11 C.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

291 This indenture, made this first day of October, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, party of the second part, witnesseth:—

That whereas, said party of the first part is the owner of a certain line of railway and telegraph now in process of construction between the Rio Grande river and the Pacific ocean, beginning at Albuquerque on the Rio Grande river in the Territory of New Mexico, and thence running westwardly by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing; thence by the most practicable and eligible route to the Pacific ocean, or however otherwise located or described, being known as the Western division of the Atlantic and Pacific railroad; and the party of the first part is now constructing and will construct, complete, equip, and open the same for traffic as rapidly as practicable;

And whereas, the party of the first part, on the first day of July, A. D. 1880, mortgaged the railroad, telegraph, equipment, appurtenances, and other property mentioned in said mortgage or intended so to be, now and hereafter composing or appertaining to said Western division, to the United States Trust Company of New York, trustee, to secure the payment of the principal and interest of its first-mortgage, six per cent., coupon and registered, gold bonds to an amount not exceeding twenty-five thousand dollars a mile, to be issued and disposed of from time to time, upon such terms as the directors of the party of the first part deem expedient;

And whereas, in case the proceeds of said bonds and of the income

bonds hereinafter provided for shall prove insufficient to pay
292 the cost of construction and equipment, including interest on said first-mortgage bonds, until the completion of said division to the Pacific coast, or until said party of the first part shall, by a contract with any other road, form a through line to the Pacific coast, and for one year thereafter; or in case the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company, under their contract of guaranty indorsed upon said mortgage, make any advances to the party of the first part, at any time, to pay the interest on said first-mortgage bonds, in whole or in part, the party of the first part, in accordance with its agreement so to do, hereby reserves the right to issue its second-mortgage interest-bearing bonds to an amount not exceeding ten thousand dollars a mile, and to dispose of them on such terms as the directors of said party of the first part deem advisable, and to secure the payment of the principal and interest of the same by a mortgage of said franchises, rights, railroad, telegraph, equipment, appurtenances, and other property to one or more trustees, subject only to the lien created by said first mortgage;

And whereas, the party of the first part has determined to make and issue its income bonds to an amount not exceeding eighteen thousand seven hundred and fifty dollars a mile, to consist of a series of bonds registered of the denominations of $500, $1,000, $5,000, and $10,000, and bonds to bearer of the denominations of $50, $100, $500, and $1,000, with dividend warrants attached, all of said bonds to be of even date herewith, and the principal sum therein named to be payable in lawful money of the United States of America on the first day of October, A. D. 1910, at the agency of the party of the first part in the city of Boston, in the State of Massachusetts, with interest thereon in like currency payable at said agency semi-annually, on the first day of April and the first day of October, from the net earnings of said Western division during the six months ending on the first day of January and the first day of July, respectively, preceding in each year, whatever said earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings, applicable to such payments being the earnings of said Western division for such
293 six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of said railroad, telegraph, equipment, and appurtenances;

And whereas, the party of the second part is willing to act as trustee for the benefit and security of any and all persons and corporations who may be or become holders of any of said income bonds,—

Now, therefore, the party of the first part, in consideration of the premises, and one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest of said income bonds according to the tenor thereof, without preference, by reason

of priority of issue, or any cause or thing whatsoever, does for itself, its successors and assigns, hereby covenant and agree to and with the party of the second part, who is hereby declared to be the trustee for any and all persons and corporations who may be or become holders of any of said income bonds, and to and with its successor or successors in said trust, that it will semi-annually, as soon as may be after the first day of January and the first day of July, and at least ten days before the first day of April and the first day of October, respectively, in each year during the continuance of this trust, make up and furnish to the trustee for the time being a fair and just account of the payments, expenses, and gross and net earnings of said Western division for the six months ending on said first day of January or July, as the case may be, so as to exhibit the true sum applicable to the payment of interest on said income bonds; and will pay the said interest, or so much thereof as has been earned, on the first days of April and October, respectively, according to the true intent and meaning hereof.

And at all reasonable times the said trustee or its successor in said trust, or its or his agents or attorneys, may, and, upon the written request of holders of said bonds to the amount of one million dollars and with proper indemnity for expenses, shall, exam-
294 ine all the books, documents, and papers of the party of the first part in any manner relating to its earnings and expenditures upon said Western division, for the purpose of verifying and correcting said accounts; and all said books, documents, and papers shall at all reasonable times be accessible to the said trustee, its or his agents or attorneys.

And the party of the second part hereby accepts said trust, and agrees to execute the same, but without any responsibility except for wilful default or gross negligence in the premises, and without any liability for the defaults or negligence of any agent or attorney, selected in good faith in the discharge of said trust.

The present or any future trustee may resign upon thirty days' notice to said company, and to the registered holders of said income bonds, or may be removed at any time by a vote of a majority in interest of said income bondholders, at any meeting of the said bondholders, such vote being attested by the signatures of the persons so voting, or by the party of the first part, with the written consent of one-fourth in interest of said bondholders; and any vacancy caused by the dissolution, death, removal, resignation, incapacity, or refusal to act, of the present or any future trustee, may be filled by appointment made by the party of the first part, or by the majority in interest of said bondholders, or, in case of their failure to make such appointment for a period of sixty days, by any justice of the Supreme Court of the United States, upon the application of any of the parties in interest; and, immediately upon the making of such appointment, in any of the ways aforesaid, all the rights, powers, and interests hereby conferred upon the trustee herein named, its successor or successors in said trust, shall pass to and become vested in such substituted trustee, without any other or further acts or deeds whatsoever.

Meetings of said bondholders may be called at any time by either of the parties hereto, by holders of said bonds, to the amount of one million dollars, or a less amount if so many are not outstanding, or by a committee of said bondholders appointed at a previous meeting, by publishing notice of the time and place of said meeting at least twice a week in one or more daily newspapers published
295 in the cities of Boston and New York, for six weeks prior to the time appointed. And every bondholder, in person or by proxy, may vote at such meeting in proportion to the amount of said bonds owned and held by him.

In witness whereof, the parties hereto have severally caused their corporate seals to be hereto affixed, and these presents to be
[SEAL.] signed by their respective presidents, and attested by their respective secretaries, on the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO,
By THOS. NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

[SEAL.] BOSTON SAFE DEPOSIT AND TRUST COMPANY,
By F. M. STONE, *President.*

Attest: EDWARD P. BOND, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, }
City of Boston, County of Suffolk, } *ss:*

On this first day of October, A. D. 1880, before me, Levi C. Wade, a notary public in and for said city and county, personally appeared Thos. Nickerson and S. W. Reynolds, known to me to be respectively president and secretary of the said Atlantic and Pacific Railroad Company, and also F. M. Stone and Edward P. Bond, known to me to be respectively president and secretary of said Boston Safe Deposit and Trust Company, and on oath severally deposed and said that they were respectively such presidents and secretaries, that they executed the foregoing instrument and affixed the corporate seals of said companies thereto, as appears, by order of their respective boards of directors, and by the like authority they severally acknowledged the same to be the free act and deed of said companies respectively.

296 In witness whereof, I have signed by name and affixed my notarial seal hereto, the day and year above written.

[NOTARIAL SEAL.] LEVI C. WADE.

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY'S DEPARTMENT, BOSTON, *November 15th*, 1880.

I hereby certify, that on the 15th day of November, 1876, Levi C. Wade was appointed and commissioned, and on the 28th day of November, 1876, duly received the qualifying oaths thereunder, as a notary public for the county of Suffolk, in said Commonwealth, for the term of seven years from the date of said commission; and

that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court.

[SEAL.] In testimony of which I have hereunto affixed the seal of the Commonwealth.

HENRY B. PEIRCE,
Secretary of the Commonwealth.

Form of Registered Bond.

No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Western division.

For value received, the Atlantic and Pacific Railroad Company promises to pay to the Boston Safe Deposit and Trust Company, or the registered holder hereof, the sum of — dollars, in lawful money of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually, on the first day of April and the first day of October in each year, from the net earnings of the Western division of the Atlantic and Pacific railroad during the six months ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the
297 earnings of said Western division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the city of Boston, in the State of Massachusetts.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of the provisions of an indenture of even date herewith, executed by the Atlantic and Pacific Railroad Company and the Boston Safe Deposit and Trust Company, trustee.

This bond is transferable only upon the books of the Atlantic and Pacific Railroad Company by the registered holder or his duly authorized attorney, and is not valid unless authenticated by a certificate indorsed hereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company

has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of October, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

Form of Bonds, with Dividend Warrants Attached.

No. —. UNITED STATES OF AMERICA. $—.

Atlantic and Pacific Railroad Company, Western division.

298 For value received, the Atlantic and Pacific Railroad Company promises to pay to the Boston Safe Deposit and Trust Company, or bearer, the sum of — dollars in lawful money of the United States of America, on the first day of October, A. D. 1910, with interest payable semi-annually on the first day of April and the first day of October in each year, from the net earnings of the Western division of the Atlantic and Pacific railroad during the six months ending on the first day of January and the first day of July, respectively, preceding, whatever said net earnings may be, but not exceeding the rate of three per cent. for each six months, and non-cumulative, upon presentation of the dividend warrants hereto annexed; the net earnings applicable to such payments being the earnings of said Western division properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Western division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the city of Boston, in the State of Massachusetts. It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Western division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of an indenture of even date herewith, executed by the Atlantic and Pacific Railroad Company, and the Boston Safe Deposit and Trust Company, trustee.

This bond is transferable by delivery, or, upon surrender of the dividend warrants hereto annexed, it may be registered, and thereafter will be transferable only upon the books of the railroad company by the registered holder or his duly authorized attorney, and principal and interest will be payable accordingly. This bond is not valid, unless authenticated by a certificate indorsed
299 hereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be hereto affixed [SEAL.] and these presents to be signed by its president, and attested by its secretary, on this first day of October, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

Trustee's Certificate.

The within bond is one of the series of income bonds, coupon and registered, mentioned in, and is entitled to the benefit of, an indenture of even date executed by the said Atlantic and Pacific Railroad Company to the Boston Safe Deposit and Trust Company, trustee, its successor or successors in said trust.

—— ——, *Trustee.*

Dividend Warrant.

The Atlantic and Pacific Railroad Company will pay to the bearer on the first day of April, on the surrender of this warrant, at its agency in the city of Boston, Mass., the proportionate part of the net income of its Western division for the half calendar year ending on the first day of —— preceding, according to the terms and conditions of its income bond No. —, but not exceeding — dollars.

—— ——, *Treasurer.*

(Indorsement:) Atlantic and Pacific Railroad Company income mortgage. Recorded in Land Grants Record, volume 2, page 363, and following, November 24th, 1880, by Arthur Martin, clerk.

300 EXHIBIT 11 D.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name, and [SEAL.] caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

Atlantic and Pacific Railroad Company.

First Mortgage, Central Division.

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and eighty-two, by and between

the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the Central Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, party of the second part, witnesseth—

That whereas, the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip, and put in operation as rapidly as practicable that part of said company's authorized line of railroad and telegraph lying between the western boundaries of the States of Missouri and Arkansas and the town of Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and hereinafter described and referred to as the "Central division."

301 And whereas, the party of the first part has entered into and duly executed an agreement with the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, dated January 9th, 1882, providing among other things for the resumption of the work of construction of said Central division, in which agreement the said St. Louis and San Francisco Railway Company and the said Atchison, Topeka and Santa Fe Railroad Company have agreed to make and execute the contract of guaranty indorsed upon this mortgage.

And whereas, said act of Congress provides as follows:—

SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

Provided, that if said route shall be found upon the line of
302 any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road and within twenty miles thereof may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of said Atlantic and Pacific railroad.

SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and, if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and continuous with said completed section of said road. And, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be
303 issued to said company, conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871, it was enacted as follows, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and, to secure said bonds, the said company may mortgage its road, equip-

ment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the Central division, has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even
304 date *date* herewith; and said coupon bonds are all of the tenor and form following, namely:—

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Central division.

First-mortgage Coupon Six per Cent. Forty-year Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the Central Trust Company of New York, trustee, or bearer, one thousand dollars, on the first day of March, A. D. 1922, in gold coin of the United States of America, of, or equivalent to, the present standard of weight and fineness, together with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of March and September, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due. Both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a mortgage of even date herewith to the Central Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its suc-

cessor or successors in said trust, the franchises, railroad,
305 telegraph, lands, land grants, and other property pertaining to said Central division, as set forth in said mortgage, and upon the trusts therein declared; and to all of the provisions in said mortgage contained this bond is hereby expressly made subject.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the Central Trust Company of New York, trustee, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon said mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company, under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company, at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the Central Trust Company of New York, trustee, or its successor or successors in said trust.

306 In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto,
[SEAL.] and these presents to be signed by its president and attested by its secretary, this first day of March, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Central division.

First-mortgage Registered Six per Cent. Forty-year Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the Central Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of March, A. D. 1922, in gold coin of the United States of America, of, or equivalent to, the present standard of weight and fineness, with interest thereon, at the rate of six per cent. per annum, in like gold coin, payable semi-annually on the first days of March and September, both principal and interest payable at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the rail-
307 road company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a mortgage of even date herewith to the Central Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Central division, as set forth in said mortgage, and upon the trusts therein declared; and to all of the provisions in the said mortgage contained this bond is hereby expressly made subject.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the Central Trust Company of New York, trustee, and used solely—

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon said mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mort-

gage. And this bond is entitled to the benefit of such provisions. This bond is not valid unless authenticated by a certificate
308 indorsed hereon, and signed by the Central Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company [SEAL.] has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, on this first day of March, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be indorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a mortgage of even date herewith, executed by said railroad company to the Central Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Central division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company indorsed upon said mortgage.

CENTRAL TRUST CO. OF NEW YORK, *Trustee,*
By —— ——.

And whereas, the party of the first part, being about to issue some of said bonds, and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desire to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described, to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue or of any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

309 Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign, and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that

part of the railroad and telegraph line of the party of the first part, known as the Central division, beginning at the west line of the State of Missouri, near Seneca, and thence by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and also beginning at or near the town of Fort Smith, on the western boundary of the State of Arkansas, and thence westwardly by the most practicable route to a point on the Canadian river, where it will intersect the line from Seneca westward, and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and in equity, of the party of the first part of, in, and to the same and any and every part thereof, with the appurtenances.

Any of the first-mortgage bonds issued hereunder out of the first three million dollars, not required for construction or for payment of interest or for any other purposes herein named, and any surplus of any future issues of said bonds not required for construction of the further extension of said division, shall be applied at par and accrued interest to pay the principal and interest of sundry promissory notes given by the party of the first part to the said St. Louis and San Francisco Railway Company and the said Atchison, Topeka and Santa Fe Railroad Company, respectively, under a tripartite agreement between the said three companies, dated January 31st, 1880, or for coupons on the old Central Division first-mortgage bonds, paid by the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, which became due on or after May 1st, 1880. The party of the first part agrees to complete said Central division, or form such through line as aforesaid, with due and reasonable diligence; and to furnish to the party of the second part, during construction, monthly accounts, showing the application of said proceeds; and to permit at any and all reasonable times an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion, from time to time sell the lands received from the United States under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold; and the party of the second part, its successor or successors in said trust, shall, upon demand, from time to time, release the lands thus sold to the party of the first part, or to the purchaser

thereof, as may be deemed most advisable, provided, however, that the appointment of the land commissioner shall be made by the party of the first part, with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable; and
311 such certificate shall, for the protection of the party of the second part be sufficient evidence of the facts therein stated. And provided also, that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the Central Trust Company of New York, trustee, its successor or successors in said trust, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

4th. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest. Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings, or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph: Provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time, execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

312 The said grant and conveyance is, however, subject to a lien upon said franchises and property of said Central division to the extent of one million one hundred and eighty-nine thousand nine hundred and five dollars of outstanding railroad and land-grant bonds, issued under and secured by a prior mortgage on said Central division, dated the first day of November, 1871, which said outstanding bonds the party of the first part hereby covenants and agrees to pro-

cure and cancel as soon as possible by giving in exchange therefor the first of the bonds issued hereunder or by purchasing them out of the proceeds of the first sale of the bonds issued hereunder, a majority both in number and interest of the holders of said outstanding prior bonds having already agreed to accept an equal amount of the bonds issued hereunder in exchange therefor. The said party of the first part covenants that no further bonds shall be issued under said prior mortgage, and that, as soon as the said outstanding bonds shall have been procured and cancelled, the said prior mortgage shall be thereupon immediately cancelled and destroyed.

To have and to hold the aforegranted premises to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely :

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents, to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds, from time to time issued and negotiated, shall, excepting such portion as may have been used as aforesaid in procuring said outstanding Central Division bonds, be deposited with the United States Trust
313 Company of New York, the Central Trust Company of New York, the Boston Safe Deposit and Trust Company, Boston, and the American Loan and Trust Company, Boston, or, in whole or in part, with such other trust companies, as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approve, to the credit of the party of the first part, and shall be used for the payment of debts and obligations contracted for such construction and equipments of the road westward from Seneca, Missouri, in the Indian Territory, and westward through the Indian Territory from or near Fort Smith, in the State of Arkansas, to the point of junction with the main line from Seneca to Albuquerque, and for the payment of any such interest on any first-mortgage bonds, issued on said division, as shall accrue on or before January 1st, 1887, as the same may be necessary and not otherwise met or provided for by the earnings and rebate applied to such payment of interest by the St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company, under their respective contracts of guarantee contained in said agreement of January 9th, 1882.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain, and enjoy the railroad and telegraph composing said Central divis-

ion, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive, and use the rents, tolls, issues, income, and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage,
314 the party of the second part, its successor or successors in said trust, may, personally or by its, his, or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property, and appurtenances of every description belonging or pertaining to said Central division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income, and profits thereof, and shall sell and dispose of said lands and land grants, and, after paying all taxes, assessments, and liens superior to the lien created by these presents, and all proper expenses of constructing, operating, and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows:

1. To the payment of interest on said first-mortgage bonds;

2. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due, the said remainder shall be applied to payment of interest and principal without preference;

3. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3; and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing indebtedness pertaining to said Central division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid shall surren-
315 der and restore the railroad and telegraph with all the rights, franchises, and property of every kind pertaining to said Central division, and all additions thereto and extensions thereof, and reserving all funds which should be retained and applied under article 3 shall deliver up all monies, bills, accounts, claims, and demands of every name and nature pertaining to said Central division, and all branches thereof, to the party of the first part, its suc-

cessors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage: Provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding, but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, land, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description then composing and pertaining to said Central division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago and San Francisco, not less than three times a week for six successive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds in the law for the same in fee-simple: which sale and conveyance, made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part and all persons claiming through, by, or under the said party. The party of the second part, its successor or successors in said trust, may pur-
316 chase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency, or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law, for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph, equipment, and appurtenances

hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Central division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his, or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding, at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any
317 time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth in amount of all said bonds outstanding; and any vacancy in the trusteeship hereby created occasioned by the dissolution, death, resignation, removal, incapacity, or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy, at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests, and powers before vested in his or its predecessor under this mortgage and upon the trusts, agreements, and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors, and administrators respectively, that they will execute, acknowledge, and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances, and assurances in the law, for the better assuring to such successor or successors the said estates, rights, titles, properties, interests, and powers, as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one
318 million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more

newspapers in the cities of Boston, New York, St. Louis, and San Francisco, twice each week, for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled, in person or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys, or servants in the discharge of said trust; and the just and reasonable charges of said trustee and its agents, attorneys, and servants, shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants, or employés, selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these presents to be signed by its president and attested by its secretary; and the Central Trust Company of New York, in token of its [SEAL.] acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By H. C. NUTT, *President.*

Attest: C. S. TUCKERMAN, *Secretary.*

(Six originals.)

319 [SEAL.] CENTRAL TRUST COMPANY OF NEW YORK,
By H. F. SPAULDING, *President.*

Attest: G. SHERMAN, *Ass't Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

On this first day of March, A. D. 1882, before me, Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared H. C. Nutt and C. S. Tuckerman, known to me to be, respectively in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested, and sealed

with said company's seal, the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[SEAL.] LEVI C. WADE,
Notary Public.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 29th day of March, A. D., 1882, before me came Henry F. Spaulding, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in the said city; that he is the president of the Central Trust Company of New York; that he knows the corporate seal of the said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation, by the like authority.

[SEAL.] D. G. FANNING,
Notary Public, Kings Co.

Filed in N. Y.

320 Whereas, the agreement dated January 9th, 1882, provides that the St. Louis and San Francisco Railway Company shall guarantee the payment of the interest of the said first-mortgage bonds to the extent of twenty-five per cent. of its gross earnings from the business interchanged with the said Central division, other than business going to or coming from the Western division; and also that the Atchison, Topeka and Santa Fe Railroad Company shall guarantee the payment of the interest of the said first-mortgage bonds to the extent of twenty-five per cent. of its gross earnings from all business interchanged by it with the said Central division going to or coming from points on its own line or lines now existing or hereafter to be built east of the one hundred and fifth principal meridian of longitude; such guaranty on the part of each company to apply and be operative from and after the date of the completion of said Central division to a point about one hundred miles westward from Vinita:—

Now, therefore, in pursuance of said agreement, and in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally covenant and agree with the Atlantic and Pacific Railroad Company and the Central Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that if, at any time after the completion of the Central division of the said company's road, in the within mortgage mentioned, to a point about one hundred miles west from Vinita, its earnings should prove insufficient to pay all coupons of interest on said bonds as they mature, they will contribute ratably, for the purpose of paying and cancelling the same from their respective earnings, as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and

Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. of the gross amount of their said described earnings respectively during the six months ending on the first days of February and August, preceding the due date of such coupons.

321 In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be attached hereto, and these presents to be signed by their [SEAL.] respective presidents and attested by the secretaries of the above companies, on this first day of March, A. D. 1882.

ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*

Attest: C. LITTLEFIELD, *Secretary.*

[SEAL.]

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By WM. B. STRONG, *President.*

Attest: GEO. L. GOODWIN,
Assistant Secretary.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that D. G. Fanning has filed in the clerk's office of the county of New York, a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment to be genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of the said court and county, the 29th day of March, 1882.

WM. A. BUTLER, *Clerk.*

322 (Indorsement:) Atlantic and Pacific Railroad Company. First mortgage, Central division. Recorded in Land Grant Record, vol. 2, p. 411, etc., and compared. Martin.

EXHIBIT 11 E.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

Atlantic and Pacific Railroad Company.

Indenture of Trust to Secure Central Division Income Bonds and Forms of Bonds.

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and eighty-two, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the American Loan and Trust Company of Boston, a corporation duly organized and existing under the laws of the State of Massachusetts, party of the second part, witnesseth:

That whereas, the party of the first part is the owner of a certain line of railway and telegraph now in process of construction between the west line of the State of Missouri and Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and from a point at or near Fort Smith, in the State of Arkansas, to the point of
323 intersection on the Canadian river with the line from Seneca to Albuquerque, known as the Central division of the Atlantic and Pacific railroad; and the party of the first part is now constructing, and will construct, complete, equip, and open the same for traffic as rapidly as practicable;

And whereas, the party of the first part on the first day of March, A. D. 1882, mortgaged the railroad, telegraph, equipment, appurtenances, and other property mentioned in said mortgage or intended so to be, now and hereafter composing or appertaining to said Central division, to the Central Trust Company of New York, trustee, to secure the payment of the principal and interest of its first-mortgage six per cent. coupon and registered gold bonds, to an amount not exceeding twenty-five thousand dollars a mile, to be issued and disposed of from time to time, upon such terms as the directors of the party of the first part deem expedient;

And whereas, in case the proceeds of said bonds and the income bonds hereinafter provided for shall prove insufficient to pay the

cost of construction and equipment, including interest on said first-mortgage bonds, until the completion of said division to Albuquerque, or until said party of the first part shall, by a contract with any other road, form a through line to Albuquerque, and for one year thereafter; or in case the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company, under their contract of guarantee indorsed upon said mortgage, make any advances to the party of the first part, at any time, to pay the interest on said first-mortgage bonds, in whole or in part, the party of the first part, in accordance with its agreement so to do, hereby reserves the right to issue its second-mortgage interest-bearing bonds to an amount not exceeding $10,000 a mile, and to dispose of them on such terms as the directors of said party of the first part deem advisable, and to secure the payment of the principal and interest of the same by a mortgage of said franchises, rights, railroad, telegraph, equipment, appurtenances, and other property to one *one* more trustees, subject only to the lien created by said first mortgage.

324 And whereas, the party of the first part has determined to make and issue its income bonds to an amount not exceeding eighteen thousand seven hundred and fifty dollars a mile, to consist of a series of bonds, registered, of the denominations of $500, $1,000, $5,000, and $10,000, and bonds to bearer of the denominations of $50, $100, $500, and $1,000, or such of the denominations of the two classes of bonds as shall be hereafter determined, with dividend warrants attached, all of said bonds to be of even date herewith, and the principal sum therein named to be payable in lawful money of the United States of America, on the first day of June, A. D. 1922, at the agency of the party of the first part in the city of Boston, in the State of Massachusetts, with interest thereon in like currency, payable at said agency semi-annually, on the first day of June and the first day of December, from the net earnings of said Central division during the six months ending on the first day of March and the first day of September, respectively, preceding in each year, whatever said earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the earnings of said Central division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of said railroad, telegraph, equipment, and appurtenances;

And whereas, the party of the second part is willing to act as trustee for the benefit and security of any and all persons and corporations who may be or become holders of any of said income bonds:

Now, therefore, the party of the first part, in consideration of the premises and one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest of said income bonds according to the tenor thereof, without preference, by reason of priority

of issue, or any cause or thing whatsoever, does for itself, its successors and assigns, hereby covenant and agree to and with the party of the second part, who is hereby declared to be the trustee for any and all persons and corporations who may be or
325 become holders of any of said income bonds, and to and with its successor or successors in said trust, that it will semi-annually, as soon as may be after the first day of March and the first day of September, and at least ten days before the first day of June and the first day of December, respectively in each year during the continuance of this trust, make up and furnish to the trustee for the time being a fair and just account of the payments, expenses, and gross and net earnings of said Central division for the six months ending on said first day of March or September, as the case may be, so as to exhibit the true sum applicable to the payment of interest on said income bonds, and will pay the said interest, or so much thereof as has been earned, on the first days of June and December respectively, according to the true intent and meaning thereof. And at all reasonable times the said trustee or its successor in said trust, or its or his agents or attorneys, may and, upon the written request of holders of said bonds to the amount of one million dollars, and with proper indemnity for expenses, shall examine all the books, documents, and papers of the party of the first part in any manner relating to its earnings and expenditures upon said Central division, for the purpose of verifying and correcting said accounts; and all said books, documents, and papers shall at all reasonable times be accessible to the said trustee, its or his agents or attorneys.

And the party of the second part hereby accepts said trust, and agrees to execute the same, but without any responsibility except for wilful default or gross negligence in the premises, and without any liability for the default or negligence of any agent or attorney, selected in good faith in the discharge of said trust.

The present or any future trustee may resign upon thirty days' notice to said company, and to the registered holders of said income bonds, or may be removed at any time by a vote of a majority in interest of said income bondholders, at any meeting of the said bondholders, such vote being attested by the signatures of the persons so voting, or by the party of the first part, with the written consent of one-fourth in interest of said bondholders; and any vacancy caused by the dissolution, death, removal, resignation, inca-
326 pacity, or refusal to act, of the present or any future trustee, may be filled by appointment made by the party of the first part, or by the majority in interest of said bondholders, or, in case of their failure to make such appointment for a period of sixty days, by any justice of the Supreme Court of the United States, upon the application of any of the parties in interest; and immediately upon the making of such appointment, in any of the ways aforesaid, all the rights, powers, and interests hereby conferred upon the trustee herein named, its successor or successors in said trust, shall pass to and become vested in such substituted trustee, without any other or further acts or deeds whatsoever.

Meetings of said bondholders may be called at any time by either

of the parties hereto, by holders of said bonds, to the amount of one million dollars, or a less amount, if so many are not outstanding, or by a committee of said bondholders appointed at a previous meeting, by publishing notice of the time and place of said meeting at least twice a week in one or more daily newspapers published in the cities of Boston and New York, for six weeks prior to the time appointed. And every bondholder, in person or by proxy, may vote at such meeting in proportion to the amount of said bonds owned and held by him.

In witness whereof, the parties hereto have severally caused their corporate seals to be hereto affixed, and these presents to [SEAL.] be signed by their respective presidents, and attested by their respective secretaries, or actuary, on the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By H. C. NUTT, *President.*

Attest: C. S. TUCKERMAN, *Secretary.*

[SEAL.]

AMERICAN LOAN AND TRUST CO. OF BOSTON,
By ASA P. POTTER, *President.*

Attest: N. W. JORDAN, *Actuary.*

327 COMMONWEALTH OF MASSACHUSETTS, } ss:
City of Boston, County of Suffolk, }

On this first day of June A. D. 1882, before me, a notary public in and for said city and county, personally appeared H. C. Nutt and C. S. Tuckerman, known to me to be respectively president and secretary of said Atlantic and Pacific Railroad Company, and also Asa P. Potter and N. W. Jordan, known to me to be respectively president and actuary of the said American Loan and Trust Company of Boston, and on oath severally deposed and said that they were respectively such presidents and secretary and actuary, that they executed the foregoing instrument and affixed the corporate seals of the companies thereto, as appears by order of their respective boards of directors; and, by the like authority, they severally acknowledged the same to be the free act and deed of said companies respectively.

[SEAL.] In witness whereof, I have signed my name and affixed my notarial seal the day and year above written.

BURTIS ARBECAM,
Notary Public.

Form of Registered Bond.

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Central division.

For value received, the Atlantic and Pacific Railroad Company promises to pay to the American Loan and Trust Company of Boston, or the registered holder hereof, the sum of — dollars, in lawful money of the United States of America, on the first day of June, A. D. 1922, with interest payable semi-annually, on the first day of June and the first day of December in each year, from the net earnings of the Central division of the Atlantic and Pacific railroad during the six months ending on the first day of March and the first day of September respectively preceding, whatever
328 said net earnings may be, but not exceeding three per cent. for each six months, and non-cumulative; the net earnings applicable to such payments being the earnings of said Central division for such six months properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Central division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company in the city of Boston, in the State of Massachusetts.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Central division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of the provisions of an indenture of even date herewith, executed by the Atlantic and Pacific Railroad Company and the American Loan and Trust Company of Boston, trustee.

This bond is transferable only upon the books of the Atlantic and Pacific Railroad Company by the registered holder or his duly authorized attorney, and is not valid unless authenticated by a certificate indorsed hereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and [SEAL.] these presents to be signed by its president, and attested by its secretary, this first day of June, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

329 *Form of Bond, with Dividend Warrants Attached.*

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Central division.

For value received, the Atlantic and Pacific Railroad Company promises to pay to the American Loan and Trust Company of Boston, or bearer, the sum of — dollars, in lawful money of the United States of America, on the first day of June, A. D. 1922, with interest payable semi-annually on the first day of June and the first day of December in each year, from the net earnings of the Central division of the Atlantic and Pacific railroad during the six months ending on the first day of March and the first day of September respectively, preceding, whatever said net earnings may be, but not exceeding the rate of three per cent. for each six months, and non-cumulative, upon presentation of the dividend warrants hereto annexed; the net earnings applicable to such payments being the earnings of said Central division properly applicable to dividends, after deducting therefrom all necessary payments and expenditures relative to said Central division, including interest, and providing for the maintenance, renewals, and necessary repairs and improvements of the same. Both principal and interest are payable at the agency of said railroad company, in the city of Boston, in the State of Massachusetts. It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of income bonds, coupon and registered, not exceeding in amount eighteen thousand seven hundred and fifty dollars a mile, issued for the purposes of construction and equipment of the Central division of the Atlantic and Pacific railroad; and all said bonds, without any preference, are entitled to the benefit of an indenture of even date herewith, executed by
330 the Atlantic and Pacific Railroad Company and the American Loan and Trust Company of Boston, trustee.

This bond is transferable by delivery, or upon surrender of the dividend warrants hereto annexed it may be registered, and thereafter will be transferable only upon the books of the railroad company by the registered holder or his duly authorized attorney, and principal and interest will be payable accordingly. This bond is not valid unless authenticated by a certificate indorsed hereon, signed by said trustee, or its successor in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, on this first day of June, A. D. 1882.

ATLANTIC AND PACIFIC RAILROAD CO.,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

Trustee's Certificate.

The within bond is one of a series of income bonds, coupon and resistered, mentioned in, and is entitled to the benefit of, an indenture of even date executed by the said Atlantic and Pacific Railroad Company to the American Loan and Trust Company of Boston, trustee, its successor or successors in said trust.

AMERICAN LOAN AND TRUST CO.,
OF BOSTON, *Trustee*,
By —— ——.

Dividend Warrant.

The Atlantic and Pacific Railroad Company will pay to the bearer, on the first day of —— on the surrender of this warrant, at its agency in the city of Boston, Mass., the proportionate part of the net income of the Central division for the half calendar year ending on the first day of March preceding, according to the terms and conditions of its income bond No. —, but not exceeding — dollars.

—— ——, *Treasurer.*

331 (Indorsement:) Atlantic and Pacific Railroad Company. Indenture of trust to secure Central Division income bonds, and forms of bonds. Recorded in Land Grant Record, vol. 2, p. 519, and following, Dec. 24th, 1885.

EXHIBIT 11 F.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

This indenture, entered into this first day of September, in the year of our Lord one thousand eight hundred and eighty-seven, between the Atlantic and Pacific Railroad Company, party of the first part, hereinafter called the Atlantic Company, the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company, parties of the second part, hereinafter called the guarantors, and the Mercantile Trust Company of New York, party of the third part, hereinafter called the trustee:

Whereas the Atlantic Company has expended in the construction of the Western division of its road the entire proceeds of the first-

mortgage bonds and of the income bonds issued and authorized to be issued upon said Western division, and has also expended in the construction of said Western division other large sums of money which have been advanced in substantially equal proportions
332 by said guarantors, upon the understanding and agreement that at the request of the said guarantors the said Atlantic Company would issue its second-mortgage bonds, to such an amount as might be requisite to pay such advances;

And whereas said Atlantic Company, at the request of said guarantors, and pursuant to the provisions of the tripartite agreement, so called, of January 31st, 1880, between said Atlantic Company and said guarantors, has determined to issue its second-mortgage bonds to the amount of five millions seven hundred thousand dollars ($5,700,000), of which five millions six hundred thousand dollars ($5,600,000) are at the rate of ten thousand dollars ($10,000) per mile of completed road between Isleta Junction and The Needles, and are to be used and applied to repay the guarantors the advances already made by them as aforesaid, and of which the remaining one hundred thousand dollars ($100,000) are at the same rate per mile on road to be completed between Isleta Junction and Albuquerque, and are to be used and applied only as hereinafter provided;

And whereas said guarantors have agreed with each other that they will severally, but not jointly, guarantee each the payment of one-half part of the principal and interest of said second-mortgage bonds, and will each accept one-half part of said bonds so guaranteed, issued on completed road as aforesaid, in full payment of its share of the advance made as hereinbefore stated;

And whereas the remaining one hundred thousand dollars of said bonds are to be retained in the treasury of said Atlantic Company, to be used and applied for the purpose of repaying to said guarantors the advances made by them for completing said road between said Isleta Junction and Albuquerque;

And whereas said second-mortgage bonds are to be six per cent. gold bonds; are to bear date the first day of September, 1887; are to be payable the first day of September, 1907, together with interest thereon, payable semi-annually, on the first days of March and September in each year; are to be for one thousand dollars each; are to contain covenants by which the said Atlantic Company shall purchase in each year, commencing with March 1st, 1890,
333 for redemption and cancellation at a price not exceeding 105 and accrued interest, bonds to the amount of not less than one hundred thousand dollars, or, if bonds to said amount cannot be so purchased, then to the amount that they cannot be so purchased, shall draw the same by lot for redemption and cancellation on any semi-annual interest due date, commencing with March 1st, 1890, upon giving the notice therein provided, and by which the said Atlantic Company may also at its option draw by lot for redemption and cancellation, on any semi-annual interest due date, commencing with March 1st, 1890, at 105 and accrued interest, such amount of said bonds as it may determine upon giving the notice

therein provided; and are to be of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Western division.

Second-mortgage Six per Cent. Guaranteed Gold Bond.

Know all men by these presents, that the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, promises to pay to the bearer, or, in case of registration, to the registered holder hereof, the sum of one thousand dollars, on the first day of September A. D. 1907, in gold coin of the United States of America, of the present standard, or its equivalent, and also interest thereon at the rate of six per cent. per annum, in like gold coin, payable semi-annually, on the first days of March and September in each year, on the presentation and surrender of the annexed coupons as they severally fall due, both principal and interest payable at the agency of said railroad company in the city of New York.

It is agreed between the said railroad company and the holder of this bond that no recourse shall be had for the payment of the principal or interest thereof to any stockholder, officer or di-
334 rector of said railroad company, either directly or through the said railroad company, by virtue of any statute or by the enforcement of any assessment or otherwise.

This bond is one of a series of the same tenor, date and amount, numbered consecutively from one upwards, limited to ten thousand dollars a mile of completed railroad of the Western division of said railroad company; is guaranteed severally, but not jointly, as to the payment of one-half the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company, and as to one-half the principal and interest by the St. Louis and San Francisco Railway Company; is secured by a mortgage of even date herewith to the Mercantile Trust Company, trustee, conveying to the said trustee and its successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of the said railroad company, as set forth in said mortgage and upon the trusts therein declared, subject to a first mortgage made by the said railroad company to the United States Trust Company of New York, as trustee, dated July first, 1880, securing the first-mortgage bonds of the said railroad company, limited to twenty-five thousand dollars a mile, and heretofore issued to the amount of sixteen million dollars, and to the provisions contained in the said first mortgage in regard to the disposition of the proceeds of the land grant of the said railroad company.

This bond may be drawn for redemption and cancellation under the provisions of the mortgage securing the same by which in each year said railroad company may draw by lot, for redemption and cancellation, on any semi-annual interest due date, commencing with March 1st, 1890, at 105 and accrued interest, such amount of

said bonds as it may determine upon giving the notice herein provided, and by which said railroad company is bound to purchase in each year, commencing as aforesaid, for redemption and cancellation at a price not exceeding 105 and accrued interest, bonds to the amount of not less than one hundred thousand dollars, or, if bonds to said amount cannot be so purchased, then to the amount that they cannot be so purchased to draw the same by lot, for redemption and cancellation on any semi-annual interest due
335 date, commencing with March 1st, 1890, upon giving the notice herein provided. Public notice of the numbers and amounts of the bonds so drawn for redemption and cancellation shall be given by publication in one daily newspaper published in each of the cities of New York and Boston, twice a week for four successive weeks, the last publication to be forty days prior to the interest due date upon which said bonds are to be redeemed and cancelled and the interest thereon is to cease.

This bond, but not its coupons, shall be subject to registration, from time to time, at the option of the holder, and if registered shall pass only by transfer upon the books of the said railroad company, unless such transfer shall have been made and registered to bearer, in which case the bond shall again pass by delivery until again registered. The coupons shall in all cases be payable to bearer, whether the bond itself is registered or not.

This bond shall be valid only when authenticated by the certificate hereon of the said trustee, or its successor or successors in the trust, that it is one of the series of bonds issued under and described in the mortgage given to secure the same.

In witness whereof the said railroad company has caused its corporate seal to be affixed hereto, and these presents to be
[SEAL.] signed by its president, and attested by its secretary, this first day of September, A. D. 1887.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By —— ——, *President.*

Attest: —— ——, *Secretary.*

Trustees' Certificate.

The Mercantile Trust Company hereby certifies that this bond is one of the bonds described in the within-mentioned mortgage given to secure the same.

THE MERCANTILE TRUST COMPANY, *Trustee,*
By —— ——, *Vice-President.*

Form of Coupon.

On the first day of ——, the Atlantic and Pacific Railroad
336 Company will pay the bearer thirty dollars ($30) in gold, at its agency in the city of New York, for interest on its second-mortgage guarantee gold bond, No. —.

—— ——, *Treasurer.*

Form of Guaranty.

The Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company, severally, but not jointly, guarantee each the payment of one-half part of the principal and interest of the within bond, as the same shall mature.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By —— ——, *Comptroller.*
ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By —— ——, *Treasurer.*

Now, therefore, the said Atlantic and Pacific Railroad Company, party of the first part, in consideration of the premises, and of the acceptance by the said trustee of the trust hereby created, and in order to secure the payment of the principal and interest of all its said second-mortgage bonds according to the tenor thereof, doth by these presents, grant, bargain and sell, convey, transfer, and assign to the said party of the third part, trustee as hereinafter set forth, its successors in said trust and assigns, forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part, known as its Western division, beginning at Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by the
337 party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described, or has been hitherto constructed; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and in equity, of the party of the first part of, in, and to the same and any and every part thereof, with the appurtenances.

To have and to hold the same to the party of the third part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said second-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, subject to the said first mortgage to the United States Trust Company of New York, trustee, dated July 1st, 1880;

In trust, nevertheless, to and for the uses and purposes and upon the covenants and conditions hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents, excepting the said first mortgage, to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said second-mortgage bonds from time to time issued and negotiated, shall be used for the purposes already recited; but the party of the third part and the holder of said bonds, shall not be obliged to make any inquiry in respect to, or be in any manner answerable for the application of said proceeds.

Article 3. The party of the first part shall, at its discretion, from time to time, sell the lands received from the United States
338 under an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the lands sold; and the party of the third part, its successor or successors in said trust, shall, upon demand, from time to time, release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable, provided, however, that the appointment of the land commissioner shall be made by the party of the first part, with the approval of the party of the third part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the third part for cause shown; that said commissioner shall certify, upon request of the party of the third part, that the prices at which any and all said lands are sold from time to time are just and reasonable; and such certificate shall, for the protection of the party of the third part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Company of New York, trustee, under the said first mortgage of the party of the first part, or its successor or successors in that trust, and used solely:

1st. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

2d. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds;

3d. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to
339 the Atlantic and Pacific Railroad Company, under their contract indorsed upon said first mortgage;

4th. For the purchase and cancellation of the first-mortgage

bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

5th. After all of the first-mortgage bonds shall have been paid or discharged, then for the purchase and cancellation of the second-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding par and interest.

The party of the third part shall release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings, or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the United States Trust Company of New York, trustee, under the said first mortgage, or its successor or successors in that trust, and applied as above, or used by the party of the first part to replace the property sold; and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said second-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain, and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights, and property of every kind, with the appurtenances, included in this mortgage, and collect, receive, and use the rents, tolls, issues, income, and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first
340 part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the third part, its successor or successors in said trust, may, personally, or by its, his, or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph, and all franchises, property, and appurtenances of every description, belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income, and profits thereof, and shall sell and dispose of said lands and land grants, and after paying all taxes, assessments, and liens superior to the lien created by these presents, including the bonds secured by the said first mortgage, and all proper expenses of constructing, operating, and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:—

1. To the payment of interest on said second-mortgage bonds.

2. To the payment of the principal of said second-mortgage bonds, if the same is then due, or if the holders of one-third, in

amount, of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due, the said remainder shall be applied to the payment of interest and principal without preference.

3. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said second-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said rail-
341 road and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph, with all the rights, franchises, and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims, and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding, but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same continues during six consecutive months and is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the third part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth, in amount, of said second-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell, subject to the first mortgage, the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago, and San Francisco, not less than three times a week for six suc-
342 cessive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds in the law for the same in

fee-simple; which sale and conveyance, made as aforesaid, shall be a perpetual bar at law and in equity, to the party of the first part, and all persons claiming through, by, or under the said party. The party of the third part, its successor or successors in said trust, may purchase at said sale, and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency, or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the second-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the second-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise in full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time, and at all times hereafter, and as often as thereunto requested by the party of the third part, its successor or successors in said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law, for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph, equipment, and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign
343 upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the said second-mortgage bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding, at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth, in amount, of all said bonds outstanding; and any vacancy in the trusteeship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity, or refusal to act, of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid, before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon

the application of the party of the first part, its successors or assigns, or of any holder or holders of the second-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests, and powers before vested in his or its predecessor under this mortgage and upon the trusts, agreements, and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge, and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to
344 the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances, and assurances in the law, for the better assuring to such successor or successors the said estates, rights, titles, properties, interests, and powers, as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis, and San Francisco, twice each week, for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled, in person or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys, or servants in the discharge of said trust; and the just and reasonable charges of said trustee and its agents, attorneys, and servants, shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants, or employés, selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

Article 11. The Atlantic Company may in each year draw by lot for redemption and cancellation on any semi-annual interest due date, commencing with March 1st, 1890, at 105 and accrued interest, such amount of said bonds as it may determine, upon giving the

notice herein provided, and in each and every year, commencing as aforesaid, shall either purchase for redemption and can-
345 cellation at a price not exceeding 105 and accrued interest, bonds to the amount of not less than one hundred thousand dollars, or, if bonds to said amount cannot be so purchased, then, to the amount that they cannot be so purchased, shall draw the same by lot for redemption and cancellation on any semi-annual interest due date, commencing with March 1st, 1890, upon giving the notice herein provided. Public notice of the numbers and amounts of the bonds so drawn for redemption and cancellation shall be given by publication in one daily newspaper published in each of the cities of New York and Boston, twice a week for four successive weeks, the last publication to be forty days prior to the interest due date upon which said bonds are to be redeemed and cancelled and the interest thereon is to cease.

Article 12. The guarantors agree with each other that they will severally, but not jointly, guarantee each the payment of one-half part of the principal and interest of said second-mortgage bonds, and will each accept one-half part of said bonds so guaranteed in full payment of its share of the advances made as before stated.

In witness whereof, the said party of the first part and the parties of the second part, have caused their respective seals to be hereto affixed, and these presents to be executed by their respective presidents thereto duly authorized, and the said party of
[SEAL.] the third part, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, thereto duly authorized, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By H. C. NUTT, *President.*

Attest: H. W. GARDINER, *Secretary.*

[SEAL.]

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By WM. B. STRONG, *President.*

Attest: C. S. TUCKERMAN,
Assistant Secretary.

346 [SEAL.]

ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*

Attest: T. W. LILLIE, *Secretary.*

[SEAL.]

THE MERCANTILE TRUST COMPANY,
By LOUIS FITZGERALD, *President.*

Attest: H. C. DEMING, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, }

On this 20th day of August, A. D. 1888, before me personally came Henry C. Nutt, president of the Atlantic and Pacific Railroad Company, of the city of Boston, Massachusetts, and William B. Strong, president of the Atchison, Topeka and Santa Fe Railroad Company, of said city of Boston, with whom I am personally acquainted, and who, being by me duly severally sworn, said that they resided in the city of Boston, as aforesaid; that they are the respective presidents of said companies, as aforesaid; that they respectively know the corporate seals of said companies; that the seals affixed to the above instruments were such respective corporate seals; that they were affixed by the order of the respective boards of directors of said companies, and that they signed their respective names thereto by like order as presidents of said companies.

[SEAL.] GEO. L. GOODWIN,
Notary Public.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 22d day of August, 1888, before me, personally came Edward F. Winslow, president of the St. Louis and San Francisco Railway Company, of the city of New York, and Louis Fitzgerald, president of the Mercantile Trust Company, of the city of
347 New York, with whom I am personally acquainted, and who being by me duly severally sworn, said that they resided in the city of New York, as aforesaid; that they are the respective presidents of said companies, as aforesaid; that they respectively know the corporate seals of said companies; that the seals affixed to the above instrument were such respective corporate seals; that they were affixed by the order of the respective boards of directors of said companies, and that they signed their respective names thereto by like order as presidents of said companies.

[SEAL.] CLIFFORD T. ARTHUR,
Notary Public, Kings Co., N. Y.

(Ctf. filed N. Y. Co.)

(Indorsement:) Second mortgage. (Western division.) Dated September 1st, 1887. Atlantic and Pacific Railroad Company, Atchison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, and the Mercantile Trust Company. Recorded in Mortgage Records, pps. 237–258.

EXHIBIT 11 G.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January 25th*, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original, of record in

this department, as required by the act of Congress approved April 20th, 1871.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be [SEAL.] affixed, the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

Indenture, entered into this fifth day of October, A. D. 1886, by and between the Atlantic and Pacific Railroad Company, party
348 of the first part, and hereinafter called the Atlantic Company; the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, parties of the second part, hereinafter called the guarantors, and the Mercantile Trust Company, party of the third part, and hereinafter called the trustee.

Whereas, the said Atlantic Company is about to issue four per cent. bonds, not to exceed twenty thousand in all, to be called "Atlantic and Pacific guaranteed trust gold bonds," to be dated and numbered, and to be of the denomination and to become due and payable all as shown by an indenture between said Atlantic Company, said Atchison Company, and said San Francisco Company, a copy of which is hereto annexed and made part of this indenture; and

Whereas, it is proposed that said bond shall be in general form as follows:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company.

Guaranteed Trust Gold Bond.

The Atlantic and Pacific Railroad Company will pay to the bearer, or in case of registration, to the registered holder, at the office of its agency in New York, one thousand dollars, in United States gold coin of the present standard, on the first day of January, A. D. 1937, together with interest from date hereof, at the rate of four per cent. per annum, payable semi-annually at said office, in like gold coin, on the first days of January and July in each year, upon presentation and surrender of the proper annexed interest coupons, or, in case of registration, upon proper written acknowledgement by the registered owner hereof.

This bond is one of a series of the same tenor, date and amount, numbered consecutively from one upwards and not exceeding twenty thousand in all; is authenticated by the certificate of the Mercantile Trust Company of New York, trustee; is guaranteed as to the payment of one-half the principal and interest by the
349 Atchison, Topeka and Santa Fe Railroad Company, and as to one-half the principal and interest by the St. Louis and San Francisco Railway Company; and has been exchanged by said

two railway companies last mentioned, par for par, for a bond of said Atlantic and Pacific Railroad Company, secured either by mortgage on its Western division, dated July first, A. D. 1880, or by mortgage on its Central division, dated March first, A. D. 1882, and is secured under the provisions of an indenture dated October 5th, 1886, between the three railroad companies and said trust company, as trustee, whereby all the mortgage bonds of said Atlantic and Pacific Railroad Company received by said Atchison, Topeka and Santa Fe Railroad Company and by said St. Louis and San Francisco Railway Company in exchange for the bonds of which this is one, are to be delivered to the said trustee and to be by it held as security for the payment of the principal and interest of said bonds of this issue.

This bond may be presented at the office of the company in Boston, or at the office of said agency in New York, for registration, in which case all coupons thereafter falling due shall be detached and cancelled and the treasurer or transfer agent shall execute the registration certificate endorsed hereon. Thereafter this bond shall be transferable only on the books of the company, and the interest and principal shall be paid only to the registered holder hereof.

Either the Atlantic and Pacific Railroad Company, or the Atchison, Topeka and Santa Fe Railroad Company, or the St. Louis and San Francisco Railway Company shall have the right to purchase in any year on any interest due date, at one hundred and five and accrued interest, any or all of the bonds of the series of which this is one. Said bonds, if so purchased, shall be drawn by lot under regulations fixed by the said trust company, and only after proposals to buy at not exceeding the same rate, being publicly advertised for a reasonable length of time, shall not have been accepted. In every such case the holders of the drawn bonds shall have notice that the same are to be purchased at the next interest due
350 date, by public advertisement, three times a week for three successive weeks, in one or more daily newspapers published in said Boston and New York; the first publication to be at least thirty days before said interest due date.

The holder of this bond shall have no recourse in any manner or in any event for the payment of either interest or principal against any stockholder, director or officer of the Atlantic and Pacific Railroad Company, either directly or through said company, by way of assessment or otherwise.

In witness whereof, the said Atlantic and Pacific Railroad Company has caused its corporate seal to be hereto affixed,
[SEAL.] and this bond to be signed by its president and attested by its secretary, thereunto duly authorized, this first day of January, A. D. 1887.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

Registration Certificate.

As provided in the within bond, the coupons have been detached and cancelled, and this bond is transferable only on the books of the company, and the interest and principal due thereon will be paid only to the registered holder thereof, or his order, upon a proper acknowledgment in writing.

Trustee's Certificate.

The Mercantile Trust Company hereby certifies that this bond is one of the bonds described in the within-mentioned indenture.

THE MERCANTILE TRUST COMPANY, *Trustee*,
By —— ——, *Vice-President.*

Form of Coupon.

351 On the first day of —— the Atlantic and Pacific Railroad Company will pay the bearer twenty dollars ($20) in gold, at its agency in the city of New York, for interest on guaranteed trust gold bond No. —.

—— ——, *Treasurer.*

The Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company severally, but not jointly, guarantee each the payment of one-half part of the principal and interest of the within bond as the same shall mature.

ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By —— ——, *Comptroller.*
ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By —— ——, *Treasurer.*

And whereas, said four per cent. bonds are to be delivered to the said Atchison and San Francisco Companies, and to be used by them in exchange, par for par, for the outstanding mortgage bonds of said Atlantic Company issued on its Western division, under mortgage dated July 1st, 1880, and on its Central Division, under mortgage dated March 1st, 1882, such four per cent. bonds, in order to accomplish such exchange, to be guaranteed as to one-half the principal and interest thereof, by said Atchison Company, and as to one-half of the principal and interest thereof by said San Francisco Company, and to be secured by a pledge of the mortgage bonds so received in exchange in accordance with the provisions of this indenture.

Now, therefore, these presents witness that the said parties, each for itself, its successors and assigns, and each in consideration of the covenants and engagements herein made by the other, have covenanted and agreed, and do hereby covenant and agree, each to and with the other, and its successors and assigns, as follows, to wit:

I.

352 The said Atlantic Company hereby assigns and transfers to the guarantors, all its interests in the mortgage bonds of said Atlantic Company, to be received by said guarantors in exchange for the said four per cent. bonds guaranteed by them, and said guarantors hereby assign and transfer to said trustee said mortgage bonds and all their interests therein, acquired or to be acquired by reason of said exchange or otherwise, and agree to deliver and cause to be delivered to said trustee said mortgage bonds as they shall be from time to time received by them in exchange, the bonds so delivered to said trustee to be held, applied and disposed of upon the trusts of this indenture.

II.

The said Atlantic Company and the said guarantors shall, from time to time, make to the said trustee the payments stipulated to be made by them respectively in the indenture hereto annexed, and they shall each, from time to time, upon request, do and perform all such acts and things as may be necessary or proper to confirm the title of the trustee to the property held by it as security hereunder, or to enable it to carry out the intent and object of this instrument.

III.

The said trustee shall receive and hold the mortgage bonds to be deposited with it as aforesaid, as security for the payment of the principal and interest of the said four per cent. bonds, and shall apply the moneys paid it by the said three companies to the payment of the interest thereon, and the principal and interest of said four per cent. bonds being paid at maturity, shall transfer and deliver one-half of said mortgage bonds to said Atchison Company, and one-half thereof to said San Francisco Company.

IV.

If, at the maturity of said four per cent. bonds, or if at any other time when the principal shall become due, such principal
353 shall not be punctually paid, the said trustee shall sell the mortgage bonds held by it as security under this indenture and apply the proceeds to the payment of said four per cent. bonds.

V.

If, prior to the maturity of said four per cent. bonds, any installment of interest becoming due thereon shall fail to be paid, the trustee shall, at the written request of a majority in interest of the holders of said four per cent. bonds, sell so much and such part of said mortgage bonds held by it as security as aforesaid, as may be necessary for the purpose, and apply the proceeds to the payment of the interest so in default.

VI.

Upon the joint and mutual request in writing of the guarantors the trustee shall use the mortgage bonds held by it as security as aforesaid, either for the purpose of foreclosing the mortgage securing said bonds, or of resisting such foreclosure, and shall take all necessary and legal measures and steps either to bring about or prevent such foreclosure. In case of such foreclosure, the proceeds, whether money or securities, shall be held by said trustee on the same trusts as the said mortgage bonds originally deposited with the trustee are to be held.

VII.

In case of default for one year in the payment of any interest due on the said four per cent. bonds, the principal thereof shall become due, provided the owners of a majority in amount of the said bonds shall so elect and signify their election by a writing addressed to and served upon the trustee. In case such default for one year shall be caused by the failure of either of the guarantors to fulfill its contract of guaranty, the other guarantor, not being in default, may elect to pay the interest then in arrears and to assume the future performance of the contract of guaranty of said defaulting guarantor and thereupon said defaulting guarantor shall be held to have released to the other guarantor not in default and so electing all its right and interest to and in the mortgage bonds received in
354 exchange for said four per cent. bonds and deposited as security with the trustee. Such election shall be manifested by a writing addressed to and served upon the trustee, and shall be accompanied by a deposit with the trustee of money sufficient to pay all interest then in arrears. Thereupon said trustee shall thereafter hold such mortgage bonds subject to the terms of the trust in favor of the holders of said four per cent. bonds and of said Atlantic road, but otherwise for the sole account and benefit of the guarantor electing as aforesaid, which said guarantor shall thereafter have and enjoy all the rights and powers by this indenture, or the indenture hereto annexed, belonging to or vested in both said guarantors. Notwithstanding such election, and the consequent determination of its interest in said mortgage bonds, the guarantor so in default on said contract of guaranty shall remain liable thereon to any party in interest, and shall also remain liable to the other parties hereto and each of them for all loss or injury arising from the failure to perform the said contract of guaranty, or to fulfill any of the provisions of this indenture or of the indenture hereto annexed. But the guarantors so in default shall be restored to and have and enjoy all its former rights and interests to and in the said mortgage bonds, so received and deposited with said trustee, upon the payment or tender of payment at any time within five years after such default, but not thereafter, to the other guarantor, as compensation and penalty, of a sum equal to the sum or sums which such other guarantor shall then have paid in the performance by it of the contract or guaranty of said defaulting guarantor, and an additional sum equal to twelve per cent. per annum upon the sum or sums thus paid by said other guarantor.

VIII.

The trustee shall authenticate said four per cent. bonds by executing the certificate endorsed thereon as fast as and to the extent that said mortgage bonds to an equal amount, par for par, are delivered to it upon the trusts herein set forth, and shall do and perform all the acts and things by it to be done and performed under this indenture, or the indenture a copy of which is hereto annexed,
355 but in the performance of said trusts shall be answerable only for gross negligence or willful default, and shall not be required to initiate or take part in legal proceedings or to do other acts and things involving cost and expense unless first indemnified against all charges, expenses and liabilities and secured a reasonable compensation for its own services.

In the event of any vacancy in the office of trustee hereunder from any cause, a new trustee shall be appointed by said Atlantic Company and said guarantors, by an instrument in writing and under seal, of which said appointment reasonable notice shall be given by public advertisement.

If no appointment to such vacancy shall be made within three months after the occurrence of the same, the circuit court of the United States for the southern district of New York, or any court of the State of New York having jurisdiction of the subject-matter, may appoint a trustee to fill such vacancy. Such appointment made in either of the modes above prescribed shall operate of itself to vest in the appointee all the estate, right, title, and interest of his or its predecessor in said trust. Nevertheless any outgoing trustee shall, upon request, be bound to execute all such deeds and conveyances to his or its successor as may be necessary or proper to vest and confirm in the latter the trust, estate and every part thereof.

In witness whereof, the said parties have caused their
[SEAL.] respective seals to be hereto affixed, and these presents to be executed by their respective presidents thereto, duly authorized the day and year before written.

ATLANTIC AND PACIFIC RAILROAD CO.,
By H. C. NUTT, *President.*
Attest: H. W. GARDINER, *Secretary.*

[SEAL.] ATCHISON, TOPEKA & SANTA FE RAILROAD CO.,
By WM. B. STRONG, *President.*
Attest: GEO. L. GOODWIN, *Assistant Secretary.*

356 [SEAL.] ST. LOUIS AND SAN FRANCISCO RAILWAY CO.,
By EDWARD F. WINSLOW, *President.*
Attest: T. W. LILLIE, *Secretary.*

[SEAL.] THE MERCANTILE TRUST COMPANY,
By LOUIS FITZGERALD, *President.*
Attest: H. C. DEMING, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } ss:

On this 15th day of December, 1886, before me personally came Henry C. Nutt, president of the Atlantic and Pacific Railroad Company, of the city of Boston, Massachusetts; William B. Strong, president of the Atchison, Topeka and Santa Fe Railroad Company, of said city of Boston; Edward F. Winslow, president of the St. Louis and San Francisco Railway Company, of the city of New York, and Louis Fitzgerald, president of the Mercantile Trust Company of the city of New York, with whom I am personally acquainted, and who, being by me duly severally sworn, said that they resided in the cities of Boston and New York, as aforesaid; that they are the respective presidents of said companies, as aforesaid; that they respectively know the corporate seals of said companies; that the seals affixed to the above instrument were such respective corporate seals; that they were affixed by the order of the respective boards of directors of said companies, and that they signed their respective names thereto by like order as presidents of said companies.

[SEAL.] C. T. ARTHUR,
Notary Public, Kings Co., N. Y.

(Ctf. N. Y. Co.)

(Indorsement:) Atlantic and Pacific Railroad Company; Atchison, Topeka and Santa Fe Railroad Company; St. Louis and San Francisco Railway Company, and the Mercantile Trust Company. Recorded in Mortgage Record, pps. 258–297.

357 Mr. SPRINGER: I offer in evidence the decision of N. C. McFarland, Commissioner of the General Land Office; H. M. Teller, Secretary of the Interior, and Charles Devens, Attorney General, showing acts of the Atlantic and Pacific Railroad Company to build its road. Marked Exhibits Nos. 12*a*, 12*b*, 12*c*, which are as follows:

EXHIBIT No. 12 A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 28th*, 1893.

I, W. M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter dated August 19th, 1881, from the Commissioner of the General Land Office to J. A. Williamson, and copies of letters dated November 28th, 1881, and December 6th, 1881, from said Commissioner to Britton & Gray, are true and literal exemplifications of the official record of said letters.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

W. M. STONE,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 19th*, 1881.

Hon. J. A. Williamson, Albuquerque, N. M.

SIR: Referring to your communication of the 4th inst., on behalf of the Atlantic and Pacific Railroad Co., proposing to deposit money, under the provisions of secs. 2401–'2–'3 of Rev. Stat. U. S., to secure the survey of certain townships in New Mexico and Arizona, along the line of road of said company, I have to state that in my judgment the provisions of said sections will not justify me in allowing the application. It is true that a corporation is, for some
358 purposes, considered a resident of the State under the laws of which it was created; but a corporation is never considered a resident in the full meaning of the term; and if it can be considered a settler in any sense, it cannot be in the sense in which that term is ordinarily used in the land laws, and especially in secs. 2401–'2–'3. Therefore I cannot authorize the deposit and surveys as requested.

Very respectfully, N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 28th*, 1881.

Messrs. Britton & Gray, Washington, D. C.

GENTLEMEN: I have considered your application for a reconsideration of my decision of August 19th, 1881, denying the application of the Atlantic and Pacific Railroad Company to be allowed to make deposit for surveys of public land, under the provisions of sections 2401–'2–'3 Revised Statutes, and the act of March 3d, 1879 (20 Stat., 352), and also the argument of Messrs. Britton & Gray, filed in support of said application.

The privileges granted by said provisions are limited by section 2401 to "settlers in any township" who desire to have the same surveyed. If it be true that any person or corporation that causes a township to be settled is a settler of such township, as is argued, yet, unless such settler is residing or located within the township, he is not a settler in the township.

Section 2403 provides: "When settlers make deposits in accordance with the provisions of section 2401, the amount so deposited shall go in part payment of their lands situated in the township the surveying of which is paid for out of such deposits."

When these provisions became law March 3d, 1871, the only settlers that could acquire any interests in public lands required to be paid for, were settlers actually resident in the township, and who resided upon and improved the lands, and who possessed
359 certain personal qualifications that pertain to individuals, and that cannot be predicated of corporations.

Though I were satisfied that the term settler, as used in the public land laws does not always means a resident, yet it seems to me ob-

vious that the term as used in the statutes under consideration means those residing in the township. Words should be construed in connection with the context in which they are found; for a word standing alone may have several significations, which when considered in relation to accompanying words and phrases, is clearly limited to one meaning; and sometimes the text clearly shows that a word has not been used in a sense which might otherwise belong to it. But it is always to be understood in the sense in which it is obviously employed in the statute or instrument to be construed. In this case it has been used in the sense of a resident, which is a proper and the most common meaning of the word, and the sense in which it is more frequently if not invariably used in the public land laws and in the correspondence and decisions of this office.

The act of March 3d, 1879, amending section 2403, Revised Statutes, provides as follows:

"When settlers make deposits in accordance with provisions of section 2401, the amount so deposited shall go in part payment for their land situated in the townships the surveying of which is paid for out of such deposits; or the certificates issued for such deposits may be assigned by endorsement, and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise."

This amendment does not enlarge the right to make deposits or extend the privilege to any parties not previously authorized to make deposits. The certificates are authorized to be assigned, but they can only be used in payment of lands entered by settlers under the pre-emption and homestead laws. Lands are entered under these laws by those settlers only who possess certain personal
360 qualifications as to age or citizenship, and who have complied with certain requirements as to residence, improvements, etc.

Whether I consider these provisions separately or collectively it appears to me that the term settler, as used in the statutes in question, means actual persons who are residents of the township, and cannot be applied to corporations that are not actual persons, and cannot be considered as residing or as being settlers in a township.

Whether the law is considered as to its terms, its general meaning, or the intention of its framers, I am clearly of the opinion that the Atlantic and Pacific Railroad Company is excluded from its provisions, and therefore adhere to my former decision.

The usual time given for appeal.

Very respectfully, N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December 6th*, 1881.

Messrs. Britton & Gray, attorneys, &c., Washington, D. C.

GENTLEMEN: I am in receipt of your letter of the 2d instant, referring to my decisions of August 19th and November 28th, 1881, denying the application of the Atlantic and Pacific Railroad Co. to

make deposit for surveys under the provisions of sections 2401–'3, U. S. Revised Statutes, and calling my attention to the alternative proposition of said company to be allowed to make deposit for the surveys named under the provisions of the act of July 31, 1876, which enacts that before any land granted to any railroad company shall be conveyed to such company * * * "there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same." * * *

You ask a ruling upon the foregoing proposition, and you suggest that the act of 1876 does not limit the time when, or the modes in
which such deposits shall be made; that it provides only
361 that the cost of surveying, etc., shall be paid before the issue
of patent for lands earned by construction, and you submit that if the company is willing to advance the necessary cost of such surveys before the same are made, there is nothing in the law which denies the privilege asked.

In reply I have to state that my view of the act of July 31st, 1876, is that before patents are issued to railroad companies for granted lands, such companies are to pay to the United States the cost of surveying; that this refers to the cost of surveys actually made by the United States, and not to an estimated or approximate cost of surveys not actually made; that the law contemplates that the surveys are to be made in the usual manner, under the regular appropriations for such service, and that after this has been done, and the land to which the railroad company is legally entitled has been selected, the cost to the United States of the surveys that have been made together with the other items of expense payable by the company, shall be paid by the company before the patents issue.

The law does not, in my opinion, contemplate a payment in advance of the actual survey and selection.

Whether a deposit in the Treasury can be made to cover a possible future cost, depends upon whether there is or there is not any law authorizing such deposits to be secured.

The Treasury is not made by law a place of general deposit. Money can only be received by the Treasury on deposit under the authority of some law of Congress.

I do not find any law that authorizes deposits to be made by railroad companies in anticipation of the cost of surveys.

If the deposit could be received there would still be no way in which the money could be drawn out to pay for surveys until Congress should make an appropriation thereof for that purpose.

Very respectfully, N. C. McFARLAND,
Commissioner.

362 EXHIBIT No. 12 B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 28th*, 1893.

I, W. M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter dated July 8th

1882, from the Secretary of the Interior to the Commissioner of the General Land Office is a true and literal exemplification of the original letter on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of [SEAL.] Washington, on the day and year above written.

W. M. STONE,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July 8th*, 1882.

The Commissioner of the General Land Office.

SIR: I have considered the appeal of the Atlantic and Pacific Railroad Company from your decision of August 19th, November 28th, and December 6th, 1881, declining to authorize the deposit of money for surveys along the line of its road:

1st. As a "settler" under sections 2401,-'2,-'3, Revised Statutes; and,

2d. As advance payment of "cost of surveys" under act of July 31st, 1876, (19 Stat., 121,) which provides that before any lands granted shall be conveyed "there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same."

The reasons given for your conclusions appear to rest upon sound construction, and your action is accordingly affirmed.

The papers submitted by your letter of December 16th, 1881, are returned.

Very respectfully, H. M. TELLER, *Secretary.*

363 EXHIBIT No. 12 C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *October 15th*, 1880.

Hon. Chas. Devens, Attorney General.

SIR: I have the honor to present for your consideration the application of the Atlantic and Pacific Railroad Company for the appointment of three commissioners to examine a section of twenty-five miles of its road west from Albuquerque, New Mexico, under section 4 of the act of Congress of July 27th, 1866 (14 Stat., 292), and the following statement in connection therewith:

The Atlantic and Pacific Railroad Company was created by and organized under the act of Congress above mentioned, and was granted the right of way, and the public lands of the United States within certain defined limits, from Springfield, Missouri, through the Indian Territory and New Mexico, to the Pacific coast.

Before 1871 the company constructed its road from Springfield to the western boundary line of the State of Missouri, and this portion of the road was duly accepted by the President, and patents for the land issued. This action was in accordance with the provisions of section 4 of the granting act, which provides that when the com-

pany shall have twenty-five consecutive miles of any portion of said railroad ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of road have been completed in all respects required by the act, the commissioners shall so report to the President of the United States, and patents of lands, as provided for by the third section of the act, shall be issued to the company.

The company next completed thirty-four miles in the Indian Territory prior to 1871, but because the United States had not extinguished the Indian title no steps were taken for the issuance of patents along the road in that Territory.

364 From the early part of the year 1871, down to August or September of this year, no section or portion of the road was constructed by the company; in fact, no work of any kind or description was done by the company on the road.

Section eight of the act makes it a condition of each and every grant, right and privilege given to the company that the company shall commence work on the road within two years from the approval of the act by the President, and shall complete no less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by July 4th, 1878.

The company has not conformed to this condition; but, as has been stated, for six years prior to July 4th, 1878, no road was constructed, and, in addition, for two years subsequent to the 4th of July, 1878, no portion of the road was constructed.

The ninth section of the act recites that the conditional grants were made and accepted upon the further condition that if the company make any breach of the conditions and allow the same to continue for upwards of one year, that in such case at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

By section twenty Congress has retained the right to add to, alter, amend, or repeal this act, having due regard for the rights of said railroad company.

Having in view the provisions and conditions of the granting act, and the failure on the part of the railroad company to perform the conditions prescribed in the manner as recited, I have the honor to request your opinion on the following question: Is it within the power and duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27th, 1866, and to cause patents to be issued to said company for lands situated opposite to and coterminous with the section of road, if completed?

365 I transmit herewith the letters and statements submitted by the company.

I am, very respectfully, C. SCHURZ, *Secretary.*

DEPARTMENT OF JUSTICE,
WASHINGTON, *Oct. 26th*, 1880.

Hon. Carl Schurz, Secretary of the Interior.

SIR: Your letter of the 15th instant presents for my consideration the application of the Atlantic and Pacific Railroad Company for the appointment of three commissioners to examine a section of twenty-five miles of its road west from Albuquerque, New Mexico, under section four of the act of Congress of July 27th, 1866.

The Atlantic and Pacific Railroad Company was created by and organized under the act of Congress above mentioned, and was granted the right of way and the public lands of the United States within certain defined limits, from Springfield, Mo., through the Indian Territory and New Mexico, to the Pacific coast.

Before 1871 it appears that the company constructed its road from Springfield to the western boundary line of the State of Missouri, and this portion of the road was duly accepted by the President and patents for the land issued. This action was in accordance with the provision of section four of the granting act, which provides that when the company shall have twenty-five consecutive miles of any portion of said railroad ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of road have been completed in all respects required by the act, the commissioners shall so report to the President of the United States, and patents to lands, as provided for by the third section of the act, shall be issued to the company.

The company next completed thirty-four miles in the Indian Territory prior to 1871; but because the United States had not extinguished the Indian title, no steps were taken for the issuance of patents along the road in that Territory.

366 From the early part of the year 1871 down to August or September of the present year, no section or portion of the road was constructed by the company; in fact, no work of any kind or description was done by the company on the road.

Section 8 of the act makes it a condition of each and every grant, right, and privilege given to the company that the company "shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year; and shall construct, equip, furnish, and complete the main line of the whole road by July 4th, 1878."

The company has not conformed to this condition, as it appears that for six years prior to July 4th, 1878, no road was constructed, and, in addition, that for two years subsequent to that date no portion of the road was constructed.

The ninth section of the act recites that the conditional grants were made and accepted upon the further condition that "if the company make any breach of the conditions and allow the same to continue for upwards of one year then in such case, at any time hereafter, the United States may do any and all acts and things which

may be needful and necessary to insure a speedy completion of the said road."

By section 20 Congress has retained the right to add to, alter, amend, or repeal this act, having due regard for the rights of said railroad company.

Having in view the provisions and conditions of the granting act, and the failure on the part of the railroad company to perform the conditions prescribed in the manner recited, you request my opinion upon the following question:

"Is it within the power and the duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27th, 1866, and to cause patents to be issued to said company for lands situated opposite to and coterminous with the section of road, if completed."

367 As I think the grant to this railroad must be treated as a present grant, to be made afterwards definite, as from time to time the various portions of the road are completed, the only inquiry would seem to be whether or not the conditions upon which the company received the grant are in their nature conditions precedent or subsequent. If conditions precedent, the failure to perform such conditions would deprive the road of its right to make application for the benefits of the act, if, after such conditions were violated, it proceeded to build portions of the road. If conditions subsequent, then it would be necessary for the United States to take advantage of such conditions by acting under the ninth section of the act, and proceeding itself to do acts and things which might be safe or necessary to insure a speedy completion of the road, or by declaring a forfeiture of the grant by legislative action or by providing for enforcing the same by a judicial proceeding. If the United States were disposed to revest in itself or to enforce a forfeiture of the lands granted, it would be necessary to take some action indicative of that intention.

The case of Schulenberg *vs.* Harriman is apparently decisive of the present inquiry. That was the case of a grant of lands to the State of Wisconsin, to aid in the construction of a certain railroad within that State by the act of June 3d, 1856. The language of the first section of that act was: "That there be, and hereby is, granted to the State of Wisconsin," the lands specified. Similar language is found in the third section of the act of July 27th, 1866: "That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company," &c., &c. In that case the grant was made upon a condition that if the road be not completed within ten years, "no further sale shall be made, and the lands unsold shall revert to the United States." The road had not been completed within the time required for its construction, which had not been extended, and Congress had passed no act, or provided for any judicial proceedings, to enforce any forfeiture of the grant for failure to construct the road within the period prescribed. Upon this state of facts it was held that the grants to the State of Wisconsin were grants *in præsenti*, which ac-

quired precision as the route of the road became fixed by its
368 location, and that the lands had not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the grants.

The conditions in the present case must be held, in view of this authority, to be conditions subsequent. Apparently they are much more strongly so than in the case referred to. The section nine, in which they are found, distinctly contemplates that the United States will do some act, and may do certain acts, upon the breach of the conditions.

I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, no action by reason of its failure to perform the conditions having been taken by authority of Congress. It having, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road; and until in some form advantage shall be taken of the breach of the conditions, it would be the duty of the executive department to give it the benefit of the grant.

I am also of opinion, therefore, that it would be within the power and duty of the Executive to appoint commissioners to examine the section of road submitted by the Atlantic and Pacific Railroad Company, to accept the same if completed in all respects required by the act of July 27th, 1866, and to cause patents to be issued to said company for lands situated opposite to and coterminous with the section of road, if completed.

I have the honor in this connection to refer to the opinion delivered to your department by me of the date of November 29th, 1879, (upon which, I understand, the department has acted,) in which the case of Schulenberg *vs.* Harriman, *supra*, was considered.

Very respectfully, your obedient servant,

CHAS. DEVENS,
Attorney General.

369 Mr. SPRINGER: I offer in evidence executive orders establishing and extending certain Indian reservations within the limits of the Atlantic and Pacific grant, since the filing of plats of definite location of the road, to wit: The Navajoes, October 29th, 1878, January 6th, 1880, and May 17th, 1884; the Zuni, March 16th, 1877, and May 8th, 1883; the Moqui, December 16th, 1882, and May 17th, 1884; the Suppai, January 8th and November 23d, 1880, and March 31st, 1882; the Hulpai, January 4th, 1883; Colorado river, November 23d, 1873, November 15th, 1874, May 15th, 1876; Camp Verde, November 9th, 1871; Fort Wingate military, February 18th, 1870, March 26th, 1881; Camp Verde military, March 30th, 1870, August 17th, 1876; Camp Mohave military, March 30th, 1870. Which are marked Exhibits Nos. 13*a*, 13*b*, 13*c*, 13*d*, 13*e*, 13*f*, 13*g*, etc., and are as follows: (By agreement the maps are to be transmitted.)

EXHIBIT No. 13 A.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *May 3d*, 1892.

I, R. V. Belt, acting Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of the several executive orders issued October 29th, 1878; January 6th, 1880; May 17, 1884 (two orders), enlarging or reducing the limits of the Navajo Indian reservation, and of January 4th, 1883, establishing the Hualapi Indian reservation, and of December 16th, 1882, establishing the Moquis Indian reservation, as the same appear on file in this office.

R. V. BELT,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 4th*, 1892.

I, George Chandler, acting Secretary for the Department
370 of the Interior of the United States of America, do hereby certify that R. V. Belt, whose name appears signed to the foregoing certificate, is now, and was at the time of signing the same, acting Commissioner of Indian Affairs, and that full faith and credit are due to his official acts as such.

In testimony whereof, I hereunto set my hand and
[SEAL.] have caused the seal of said department to be affixed, on the day and year above written.

GEO. CHANDLER,
Acting Secretary.

Navajo Reserve.

EXECUTIVE MANSION, *October 29th*, 1878.

It is hereby ordered, that the tract of country in the Territory of Arizona lying within the following-described boundaries, viz: Commencing at the northwest corner of the Navajo Indian reservation, on the boundary line between the Territories of Arizona and Utah; thence west along said boundary line to the one hundred and tenth degree of longitude west; thence south along said degree to the thirty-sixth parallel of latitude north; thence east along said parallel to the west boundary of the Navajo reservation; thence north along said west boundary to the place of beginning, be, and the same hereby is, withdrawn from sale and settlement, and set apart as an addition to the present reservation for the Navajo Indians.

R. B. HAYES.

EXECUTIVE MANSION, *January 6th*, 1880.

It is hereby ordered that the following-described country lying within the boundaries of the Territories of New Mexico and Ari-

zona, viz: Commencing in the middle of the channel of the San Juan river, where the east line of the Navajo reservation in the Territory of New Mexico, as established by the treaty of June 1st, 1868 (15 Stat., 667), crosses said river; thence up and along the middle channel of said river to a point 15 miles due east of the eastern boundary line of said reservation; thence due south
371 to a point due east of the present southeast corner of said reservation; thence due south 6 miles; thence due west to the one hundred and tenth degree of west longitude; thence north along said degree to the southwest corner of said reservation in the Territory of Arizona, as defined by executive order dated October 29th, 1878, be, and the same is hereby withdrawn from sale and settlement, and set apart as an addition to the present Navajo reservation in said Territories.

R. B. HAYES.

EXECUTIVE MANSION, WASHINGTON, *May 17th*, 1884.

It is hereby ordered, that the executive order dated January 6th, 1880, adding certain lands to the Navajo reservation in New Mexico and Arizona Territory, be, and the same is hereby amended so as to exempt from its operation and exclude from said reservation all those portions of township 29 north, ranges 14, 15 and 16 west of the New Mexico principal meridian, south of the San Juan river, in the Territory of New Mexico.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, WASHINGTON, D. C., *May 17th*, 1884.

It is hereby ordered, that the following-described lands in the Territories of Arizona and Utah be, and the same are, withheld from sale and settlement and set apart as a reservation for Indian purposes, viz:

Beginning on the one hundred and tenth degree of west longitude at 36 degrees and 30 minutes north latitude (the same being the northeast corner of the Moqui Indian reservation); thence due west to the one hundred and eleventh degree thirty minutes west longitude; thence due north to the middle of the channel of the Colorado river; thence up and along the middle of the channel of said river to its intersection with the San Juan river, thence up and along the middle channel of San Juan river to the west boundary of Colorado (32 degrees west longitude, Washington meridian); thence due south to the thirty-seventh parallel north latitude; thence west along said parallel to the one hundred and tenth degree of west longitude; thence due south to place of beginning:
372 Provided, that any tract or tracts within the region of country described as aforesaid, which are settled upon or occupied, or to which valid rights have attached under existing laws of the United States, prior to date of this order, are hereby excluded from this reservation.

CHESTER A. ARTHUR.

EXHIBIT No. 13 B.

Hualpai Reserve.

EXECUTIVE MANSION, *January 4th*, 1883.

It is hereby ordered, that the following-described tract of country situated in the Territory of Arizona be, and the same is hereby, set aside and reserved for the use and occupancy of the Hualpai Indians, namely: Beginning at a point on the Colorado river 5 miles eastward of Tinnakah spring; thence south 20 miles to crest of high mesa; thence south 40 degrees east 25 miles to a point of Music mountains; thence east 15 miles; thence north 50 degrees east 35 miles; thence north 30 miles to the Colorado river; thence along said river to the place of beginning; the southern boundary being at least 2 miles south of Peach spring and the eastern boundary at least 2 miles east of Pine spring. All bearings and distances being approximate.

CHESTER A. ARTHUR.

EXHIBIT No. 13 C.

Moqui Reserve.

EXECUTIVE MANSION, *December 16th*, 1882.

It is hereby ordered that the tract of country in the Territory of Arizona, lying and being within the following-described boundaries, viz: Beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north; thence due west to the one hundred and eleventh degree of longitude west; thence due south to a point of longitude 35° 30′ north;
373 thence due east to the one hundred and tenth degree of longitude west; thence due north to place of beginning, be, and the same is hereby, withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

CHESTER A. ARTHUR.

EXHIBIT No. 13 D.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *January 6th*, 1893.

I, T. J. Morgan, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of executive orders dated March 16th, 1877, and May 1st, 1883, reserving certain lands in New Mexico for the Zuni Indians, as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, on the day and year first above written.

T. J. MORGAN,
Commissioner.

Zuni Reserve.

EXECUTIVE MANSION, *March 16th*, 1877.

It is hereby ordered, that the following-described tract of country, in the Territory of New Mexico, viz: Beginning at the one hundred and thirty-sixth mile-stone, on the western boundary line of the Territory of New Mexico, and running thence N. 61° 45′ E. thirty-one miles and eight-tenths of a mile, to the crest of the mountain, a short distance above Nutrias spring; thence due south twelve miles,
374 to a point in the hills a short distance southeast of the Ojo Pescado; thence S. 61° 45′ W. to the one hundred and forty-eighth mile-stone on the western boundary line of said Territory; thence north with said boundary line to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart as a reservation for the use and occupancy of the Zuni Pueblo Indians.

R. B. HAYES.

EXECUTIVE MANSION, *May 1st*, 1883.

Whereas, it is found that certain descriptions as to boundaries given in an executive order issued March 16th, 1877, setting apart a reservation in the Territory of New Mexico, for the Zuni Pueblo Indians, are not stated with sufficient definiteness to include within said reservation all the lands specified in, and intended to be covered by said executive order, especially the Nutria springs and the Ojo Pescado, said executive order is hereby so amended that the description of the tract of land thereby set apart for the purposes therein named shall read as follows:

Beginning at the 136th mile-post on the west boundary line of the Territory of New Mexico; thence in a direct line to the southwest corner of township 11 north, range 18 west; thence east and north, following section lines so as to include sections 1, 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35 and 36, in said township; thence from the northeast corner of said township on the range line between ranges 17 and 18 west to the third correction line north; thence east on said correction line to the nearest section line in range 16, from whence a line due south would include the Zuni settlements, in the region of Nutria and Nutria springs, and the Pescado springs; thence south, following section lines to the township line between townships 9 and 10 north, range 16 west; thence west on said township line to the range line between ranges 16 and 17 west; thence in a direct line to the 148th mile-post on the western boundary line of said Territory; thence north along said boundary line to place of beginning.

CHESTER A. ARTHUR.

375 EXHIBIT No. 13 E.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *Jan. 6th*, 1893.

I, T. J. Morgan, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of executive orders dated June 8th, 1880, November 23d, 1880, and March 31st, 1882, reserving certain lands in Arizona for the Suppai Indians, as the same appear on file in this office.

In testimony whereof, I — hereunto subscribed my name, [SEAL.] and caused the seal of this office to be affixed, on the day and year first above written.

T. J. MORGAN,
Commissioner.

Suppai Reserve.

EXECUTIVE MANSION, *June 8th*, 1880.

It is hereby ordered, that the following-described country, lying within the boundaries of the Territory of Arizona, viz:

Beginning at a point in the middle of Cataract creek, two miles below the lowest fall, south of the settlement of the Suppai Indians; thence due east two and one-half miles; thence in a northerly direction twelve miles to a point two and one-half miles due east of the middle of said creek; thence due west five miles; thence in a southerly direction twelve miles to a point two and one-half miles due west of the middle of said creek; thence due east two and one-half miles to the place of beginning, to embrace the settlements and improvements of the Suppai Indians, be, and the same is hereby withdrawn from sale and settlement, and set apart for the use and occupancy of said Suppai Indians.

R. B. HAYES.

EXECUTIVE MANSION, *November 23d*, 1880.

376 It is hereby ordered, that the following-described country, lying within the boundaries of the Territory of Arizona, viz:

Beginning at a point in the middle of Cataract creek, two miles below the lowest fall, north of the settlement of the Suppai Indians; thence due east two and one-half miles; thence in a southerly direction twelve miles to a point two and one-half miles due east of the middle of said creek; thence due west five miles; thence in a northerly direction twelve miles to a point two and one-half miles due west of the middle of said creek; thence due east two and one-half miles to the place of beginning, to embrace the settlements and improvements of the Suppai Indians, be, and the same is hereby, withdrawn from sale and settlement, and set apart for the use and occupancy of said Suppai Indians, and the executive order, dated

June 8th, 1880, withdrawing from sale and setting apart a reservation for said Indians is hereby revoked.

R. B. HAYES.

EXECUTIVE MANSION, *March 31st*, 1882.

It is hereby ordered, that the following-described country, lying within the boundaries of the Territory of Arizona, viz:

So much of the bottom land of the cañon of Cataract creek, bounded by walls of red sandstone on the east and west, as is included within certain lines, viz: On the south and east and west lines (magnetic) crossing said cañon at a narrow pass marked by a monument of stone, placed in the summer of 1881, by Lieutenant Carl Palfrey, of the corps of engineers of the army, about two miles above the village of the Yavai Suppai Indians, and on the north a line bearing N. 55° E. (magnetic) crossing said cañon at the crest of third falls of Cataract creek, and marked by Lieutenant Palfrey by two monuments of stone, one on each side of the stream, be, and the same is hereby, withdrawn from sale and settlement, and set apart for the use and occupancy of said Yavai Suppai Indians, and the executive order, dated November 23d, 1880, withdrawing from sale and settlement and setting apart a reservation for said Indians, is hereby revoked.

CHESTER A. ARTHUR.

377 EXHIBIT No. 13 F.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *Jan. 6th*, 1893.

I, T. J. Morgan, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of executive orders dated November 22d, 1873, November 16th, 1874, and May 15th, 1876, reserving certain lands in Arizona and California for the Indians of the Colorado river and its tributaries, as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name, and caused the seal of this office to be affixed, on the day and year first above written.

T. J. MORGAN,
Commissioner.

Colorado Reserve.

EXECUTIVE MANSION, *Nov. 22d*, 1873.

It is hereby ordered, that the following-described tract of country, in the Territory of Arizona, be withdrawn from sale and added to the reservation set apart for the Indians of the Colorado river and its tributaries, by act of Congress approved March 3d, 1865 (U. S. Stats., at Large, vol. 13, p. 559), viz:

All that section of bottom land adjoining the Colorado reserve,

and extending from that reserve on the north side, to within six miles of Ehrenberg on the south, bounded on the west by the Colorado river, and east by mountains and mesas.

U. S. GRANT.

EXECUTIVE MANSION, *Nov.* 16*th*, 1874.

It is hereby ordered, that a tract of country embraced within the following-described boundaries, which covers and adds to the
378 present reservation, as set apart by act of Congress approved March 3d, 1865 (Stat. at Large, vol. 13 p. 559), and enlarged by executive order, dated November 22d, 1873, viz:

Beginning at a point where the La Paz arroyo enters the Colorado river, four miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz mountain; thence with said crest of mountain in a northerly direction to the top of Black mountain; thence in a northwesterly direction across the Colorado river to the top of Monument peak, in the State of California; thence southwesterly in a straight line to the top of Riverside mountain, California; thence in a southeasterly direction to the point of beginning, be, and the same is hereby withdrawn from sale and set apart as the reservation for the Indians of the Colorado river and its tributaries.

U. S. GRANT.

EXECUTIVE MANSION, *May* 16*th*, 1876.

Whereas, an executive order was issued November 16th, 1874, defining the limits of the Colorado River Indian reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3d, 1865, and executive order dated November 22d, 1873, and,

Whereas, the order of November 16th, 1874, did not revoke the order of November 22d, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby declared to be the boundaries of the Colorado River Indian reservation in Arizona and California, viz:

Beginning at a point where the La Paz arroyo enters the Colorado river, four miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz mountain; thence with said mountain crest in a northerly direction to the top of Black mountain; thence in a northwesterly direction across the Colorado river to the top of Monument peak, in the State of California; thence southwesterly in a straight line to the top of River-
379 side mountain, California; thence in a direct line towards the place of beginning, to the west bank of the Colorado river; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. GRANT.

EXHIBIT No. 13 G.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* —, 1893.

I, W. M. Stone, Commissioner of the General Land Office, do hereby certify that the annexed copies of executive orders establishing or extending the following military reservations, viz: Fort Wingate, N. M., dated February 18th, 1870, and March 26th, 1881; Camp Verde, Arizona, March 30th, 1870, and August 17th, 1876; and Camp Mojave, Arizona, March 30th, 1870, and of the letters, endorsements, maps and field-notes forming a part of said orders, are true and literal exemplifications of the originals on file in this office.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

W. M. STONE,
Commissioner of General Land Office.

HEADQUARTERS DEPARTMENT OF THE MISSOURI,
ST. LOUIS, MO., *February 7th*, 1870.

To the adjutant general U. S. Army, Washington, D. C.

GENERAL: In compliance with instructions of the general of the army of June 6th, 1868, I have the honor to transmit herewith map and field-notes of the military reservation of Fort Wingate, N. M., with a view to its being properly declared by the President.

I am, General, very respectfully, your obedient servant,

J. M. SCHOFIELD,
Major General Commanding.

380 (First endorsement.)

WAR DEPARTMENT, *February 18th*, 1870.

Approved and respectfully submitted for the action of the President.

WM. W. BELKNAP,
Secretary of War.

EXECUTIVE MANSION, *February 18th*, 1870.

The reservation at Fort Wingate, New Mexico, as described in the accompanying plat and notes of survey—approved by the Secretary of War—is made for military purposes, and the Secretary of the Interior will cause the same to be noted in the General Land Office, to be reserved as a military post.

U. S. GRANT, *President.*

(Second endorsement.)

FEBRUARY 7TH, 1870.

Major General J. M. Schofield, commanding department of the Missouri, in accordance with instructions of June 6th, 1868, from headquarters of the army, transmits plat and field-notes of the military reservation at Fort Wingate, New Mexico, with a view to its being properly declared by the President. The proposed reservation is ten (10) miles square.

Washington, February 14th, 1870.

Respectfully submitted to the Secretary of War.

W. T. SHERMAN, *General.*

(Third endorsement.)

HEADQUARTERS DEPARTMENT OF THE MISSOURI,
February 7th, 1870.

Major General J. M. Schofield, commanding, forwards plat and field-notes of the military reservation of Fort Wingate, N. M., with a view of having it properly declared by the President.

WAR DEPARTMENT,
WASHINGTON CITY, *March 21st*, 1881.

To the President.

SIR: Upon recommendation of the post commander, con-
381 curred in by district and department commanders, and by the lieutenant general and the general of the army, I have the honor to request that the U. S. military reservation of Fort Wingate, in the Territory of New Mexico, originally declared by executive order dated February 18th, 1870, with an area of one hundred (100) square miles—being ten (10) miles square—may be duly extended by the addition of a tract of unsurveyed land three (3) miles wide and ten (10) miles long, immediately south of, and adjacent to the existing reservation.

A map of the Fort Wingate reservation, showing the proposed extension, is enclosed—the said extension being desired for the purpose of supplying the post, which is an important one, and which the lieutenant general desires to have enlarged, with timber for necessary building material, etc.

I have the honor to be, sir, with great respect, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

(First endorsement.)

EXECUTIVE MANSION, WASHINGTON, *March 26th*, 1881.

The within request is approved, and the extension of the reservation is made and proclaimed accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

JAMES A. GARFIELD.

(Second endorsement.)

WASHINGTON CITY, *March 21st*, 1881.

Secretary of War requests that the U. S. military reservation of Fort Wingate, New Mexico may be extended by the addition of a tract of unsurveyed land, three (3) miles wide and ten (10) miles long, immediately south of, and adjacent to the existing reservation, for the purpose of supplying this important post with timber for building material, etc. Encloses map of reservation showing proposed extension.

382 EXHIBIT No. 13 H.

WAR DEPARTMENT,
WASHINGTON CITY, *August 16th*, 1876.

To the President.

SIR: In accordance with recommendation of the commanding officer department of Arizona, for the reasons set forth in the accompanying communication of the acting engineer officer of that department, I have the honor to request that the United States military reservation at Camp Verde, in the Territory of Arizona, declared by executive order, dated March 30th, 1870, may be enlarged, with boundaries as described in the accompanying plat and field-notes of the survey made by 1st Lieutenant E. D. Thomas, 5th cavalry, acting engineer officer, department of Arizona, in February, 1876.

I am, sir, very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

(First endorsement.)

EXECUTIVE MANSION, WASHINGTON, *August 17th*, 1876.

The within request is approved and the enlargement of the reservation is made accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

U. S. GRANT.

(Second endorsement.)

WASHINGTON, *August 16th*, 1876.

Secretary of War requests that the U. S. military reservation at Camp Verde, Arizona Territory, declared March 30th, 1870, may be enlarged by the Executive, in accordance with the survey of Lieut. E. D. Thomas, 5th cavalry, acting engineer officer, department of Arizona, in February 1876. Plat and field-notes accompanying. (3 enclosures.)

ENGINEER OFFICE,
HEADQUARTERS DEPARTMENT OF ARIZONA,
PRESCOTT, A. T., *March 9th*, 1876.

383 Field-notes of the survey of military reservation at Camp Verde, Arizona. Surveyed by E. D. Thomas, 1st lieut. 5th cavalry A. D. C., acting engineer officer department of Arizona. Survey commenced February 15th, 1876; survey completed February 19th, 1876.

Camp Verde Reservation.

Chains.

Starting point: South corner of the northeast quarter of section 7; also, south corner of the northwest quarter of section 8, township No. 13 north, range No. 5 east, Gila and Salt River meridian. This corner bears from flagstaff S. 3° 12′ W. 164.70 chains. Post marked "Mil. Res. 1876," marks the starting point in mound of earth by quarter-section stake of public survey; thence north 87° 12′ W. to east bank of River Verde, bearing of —— S. E., width of 10.96 chains.

15.0 West bank of river.
26.0 East bank of river.
58.0 Cottonwood tree (witness) blazed on east and west side. River follows chain line up to—
63.0 River bears north.
69.38 Crossed ditch of Verde settlements below post.
80.0 S. W. corner of reservation, established by post in mound of earth, post projecting above mound 3′ and marked as follows: No. I, S. W. corner Mil. Res. 1876, corner established at 3 p. m. February 16th, 1876, variation 14° 25′ east. From this corner Squaropoake bears S. 25° 30′ W.; thence N. 23° 15′ W.
20.0 Foot of hill.
28.0 Summit of hill.
40.0 Valley running east.
60.0 Foot of hill.
70.0 Deep washes in ravine bearing east.
86.0 Clay bank and commencement of broad valley.
102.0 Crossed road to Ft. Whipple, through Copper cañon.
108.0 Foot of hill.
199.02 Crossed road bearing to Ft. Whipple.
122.0 Summit of hill—telegraph line.
124.0 Deep ravine—rolling mesa.

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279.0 High rocky hill.
309.0 High conical hill.
350.0 Hay road—commencement of rolling mesa.

411.17 Corner of reservation, established by a post in mound of earth, projecting above mound 3½ feet and marked as follows: N. W. corner military reserve, 1876. Magnetic variation 14° 25′ E. Corner established February 18th, 1876, at 3 p. m. From this corner Squaropoak bears S. 12° 15′ east; San Francisco mountains bear N. 14° 25′ east; flagstaff bears S. 52° 35′ east; thence N. 48° 12′ east.

62.0 West bank of Rio Verde.

65.0 East bank of Rio Verde.

142.0 Northeast corner of reservation—survey of 1869; also north corner of new survey—corner established by post in monument of stones 2 feet square at base, 2 feet high, post projecting above monument 3 feet and marked U. S. M. R., established February 18th, at 10 a. m. Variation 14° 25′ east; thence S. 87° 12′ east.

58.50 Hay road N. W.

77.20 Hay road, corner of reservation, established by a post in mound of earth, projecting above mound 3 feet and marked as follows: N. E. corner U. S. military reserve, 1876. Established February 18th, 1876, at 12.30 p. m. Variation 14° 25′ E.; thence S. 23° 15′

9.0 Beaver road.

18.0 Foot of hill.

27.0 Summit of hill.

40.0 Descent of hill.

49.0 Bank of Beaver creek.

60.0 Beaver creek.

61.0 Here line passes over very steep rocky bluffs and rolling mesa to corner.

476.0 S. E. corner of reservation, established by post in mound of earth, projecting above mound 3 feet and marked as follows: S. E. corner U. S. military reservation, 1876, established February 16th, 1876, at 11 a. m. Variation
385 14° 25′ east. From this corner Squaropoak bears S. 25° 30′ W.; thence N. 87° 12′ W.

33.90 Summit of hills.

82.0 Road to settlement.

94.0 Valley.

141.20 Road to settlement below post.

160.0 Starting point south corner of the northeast quarter of section 7—variation of needle 14° 25′ east.

Variations determined by observations of the polaris at its greatest western elongation. Good grazing. Land for all wants of post. Dam and acquia included in survey of 1876.

E. D. THOMAS,
1st Lieut. 5th Cav. A. D. C. and Act. Engineer Officer, Dep't of Arizona.

(Indorsement:) Department of Arizona. Field-notes of the survey of military reservation at Camp Verde, A. T., surveyed by 1st

Lieut. E. D. Thomas, 5th Cav., A. E. O. dep. Arizona. Survey commenced February 15th, 1876; survey completed February 19th, 1876.

EXHIBIT No. 13 I.

HEADQUARTERS MILITARY DIVISION OF THE PACIFIC,
SAN FRANCISCO, CAL., *March 12th*, 1870.

Adjutant general U. S. Army, Washington, D. C.

SIR: I have the honor to transmit herewith plats of the following-named reservations in Arizona, and request that they may be declared in accordance with the limits herein given.

Camp Mojave.

Commencing at a post marked U. S. in a mound of earth situated N. 83° 31′ 37″ E. 68.99 chains distant from the flagstaff at the post. Thence, variation 14° 08 28″ east, south33° 08′ 28″ W. 240.00 chains to a post marked U. S., in mound of sand. Thence N. 56° 51′ 32″ W. 232.60 chains, to a post marked U. S. in mound of coarse gravel. Thence N. 33° 08′ 28″ E. 240.00 chains, to a
386 post marked U. S. in a mound of coarse gravel near the west bank of Beaver lake. Thence S.56° 51′ 32″ E. 232.60 chains to the point of commencement. The said boundaries containing 5,582 acres 1 rood 24 perches, a little more or less.

Reservation for hay and wood.—Commencing at a post marked U. S. in mound of earth situated S. 10° 43′ 41″ E. 347.52 chains distant from the flagstaff at Camp Mojave, and about 20 chains S. W. from point where the road crosses the top of the mesa. Thence, variation 14° 08′ 28″ east, S. 1° 04′ 28″ W. 272.50 chains to a post marked U. S., in mound of earth near the quartermaster's corral. Thence S. 76° 17′ 28″ W. 228.50 chains, to a post marked U. S. in mound of earth near the left bank of the Colorado river. Thence N. 23° 01′ 32″ W. 362.70 chains, to a post marked U. S., in a mound of earth near the left bank of the Colorado river. Thence S. 88° 45′ 32″ E. 379.00 chains, to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less. And the intermediate tract lying between the hay and the post reservation, bounded on the west by the Colorado river, and on the east by a line running from station 1 of the hay and wood reserve to station 1 of the post reserve.

Camp Verde.

Commencing at a post in mound of stones situated S. 70° 09′ 56″ E. 83.16 chains distant from the easternmost chimney of the building used as company quarters at the post, and on a rocky bluff near an old ruin. Thence, variation 13° 48′ 04″ east, N. 31° 11′ 56″ W. 246.47 chains to a post marked U. S., in mound on southwest slope of hill. Thence S. 53° 48′ 04″ W. 110.00 chains to a post marked U. S., in mound of earth in open grass land. Thence S. 31° 11′ 56″

E., 246.47 chains to a post marked U. S. in mound of earth in open grass land, which post bears from the easternmost chimney of the building used as company quarters at the post, S. 7° 03′ 04″ E. 93.55 chains distant. Thence N. 53° 48′ 04″ E. 110.00 chains to the post at the point of commencement. The said boundaries containing 2,770.81 acres, more or less.

387 *Camp Date Creek.*

Commencing at a post marked U. S., in a mound of earth and stones, on the top of a spur sloping west, and N. 48° 56′ 30″ E., 176.67 chains distant from the eastern gable of the hospital building at the post. Thence, variation 12 deg. 46 min. 30 sec. east, S. 72 deg. 41 min. 30 sec. W. 426.15 chains to a post marked U. S., in mound of earth on a spur sloping south. Thence S. 1 deg. 16 min. 30 sec. W. 132.00 chains to a post marked U. S., in a mound of stones on the west side of a small ravine. Thence N. 72 deg. 41 min. 30 sec. E. 426.15 chains to a post marked U. S., in mound of stones among granite boulders, and which bears from the eastern gable of the hospital building S. 83 deg. 40 min. 30 sec. E. 132.60 chains distant. Thence N. 1 deg. 16 min. 30 sec. E. 132.00 chains to the post at the point of commencement. The said boundaries containing 5,623.90 acres, more or less.

Camp McDowell.

Commencing at a post marked U. S., situated on a little stony hill about 1¼ miles west of the River Verde. Thence, variation 12 deg. 30 sec. east, S. 0 deg. 45 min. W. 560 chains to a post marked U. S., in a dry arroya with gentle banks. Thence S. 89 deg. 15 min. E. 160.00 chains to a post marked U. S., in a small valley, from which a blazed mesquite bears S. E. 15 feet distant. Thence N. 0 deg. 45 min. E. 560.00 chains, to a post marked U. S., on the south bank of a small valley. Thence N. 89 deg. 15 min. W. 160.00 chains to the post at the point of commencement. The said boundaries containing 8,960 acres, a little more or less.

Camp Grant.

Commencing at a post marked U. S., in a mound of earth on a spur sloping S. W., and which post bears N. 5 deg. 40 min. 30 sec. W. 116.71 chains distant from the flagstaff at the post. Thence, variation 12 deg. 32 min. 0 sec. east, S. 23 deg. 28 min. E. 237.00 chains to a post marked U. S., in a mound of earth on top of a mesa and about 3 chains south of the left bank of a ravine
388 and which post bears from the flagstaff at the post S. 64 deg. 10 min. E. 130.67 chains distant. Thence S. 68 deg. 32 min. W. 85.78 chains to a post marked U. S., in a mound of earth on the N. W. side of a dry wash. Thence N. 23 deg. 28 min. W. 237.00 chains to a post marked U. S., in a mound of earth on top of a spur sloping N. E. Thence N. 68 deg. 32 min. E. 85.78 chains to the post at the point of commencement. The said boundaries containing 2,031.70 acres, a little more or less.

Camp Bowie.

Commencing at a post marked U. S., in a mound of stones on top of a rocky spur, course about N. E., and which post bears S. 80 deg. 19 min. 01 sec. E. 1,828 chains distant from the point fixed for the site of the flagstaff at the post. Thence, variation 11 deg. 07 min. 50 sec. east, S. 64 deg. 49 min. 59 sec. W. 80.46 chains to a post marked U. S., in a mound of stones on top of a spur sloping north, and which post bears S. 55 deg. 45 min. 59 sec. W. 66.28 chains distant from the point fixed for the site of the flagstaff at the post. Thence N. 28 deg. 10 min. 01 sec. W. 95.66 chains to a post marked U. S., in a mound of earth on a low spur sloping east, and about 5 chains south from the new road to Tucson. Thence N. 64 deg. 49 min. 59 sec. E. 80.46 chains to a post marked U. S., in a mound of stones and earth on the north side of a spur sloping west, and about 5 chains from the road leading through the old pass to Camp Goodwin. Thence S. 28 deg. 10 min. 01 sec. E. 95.66 chains to the post at the point of commencement. The said boundaries containing 668.83 acres, a little more or less.

Camp Crittenden.

Commencing at a post marked U. S., in a mound of earth on top of a spur sloping S. W. and which bears N. 69 deg. 02 min. 21 sec. E. 100.38 chains from the N. W. corner of the guard-house at the post. Thence, variation 12 deg. 14 min. 21 sec. east, S. 34 deg. 56 min. 21 sec. W. 238.91 chains to a post marked U. S., in mound of earth on top of a low ridge, course S. W. Thence N. 86 deg. 17 min. 39 sec. W. 160.50 chains to a post marked U. S., in a mound
389 of earth on the top of a high spur. Thence N. 34 deg. 56 min. 21 sec. E. 238.91 chains to a post marked U. S., in a mound of earth on top of a spur sloping S. E., about 10 chains east of a wood road, and which post bears N. 55 deg. 08 min. W. 80.95 chains from the N. W. corner of the guard-house at the post. Thence S. 86 deg. 17 min. 39 sec. E. 160.50 chains to the post at the point of commencement. The said boundaries containing 3,278.08 acres, more or less.

These are all the plats of posts in Arizona of which surveys have been made, and at which reservations have not yet been declared, excepting Toll Gate, and the new post proposed to be located in the Pinal Mountain region, when Camp Goodwin shall have been broken up. These last will be surveyed and the plats forwarded as soon as possible.

Camp Colorado is believed to be on an Indian reservation, at all events, it is now garrisoned by a detachment stationed at the Indian reservation buildings for the protection of the agents and employés, and is not needed, except as an Indian reservation.

Camp Reno will shortly be abandoned.

The surveys and plats of reservations in California, Nevada, de-

partments of Columbia, and of Alaska, will be forwarded as soon as completed.

Very respectfully, your obedient servant,

GEO. H. THOMAS,
Major General U. S. A., Commanding.

HEADQUARTERS MILITARY DIVISION OF PACIFIC,
SAN FRANCISCO, CAL., *March 12th*, 1870.

Geo. H. Thomas, major general U. S. A., transmits plats of reservations in Arizona, with the request that they may be declared in accordance with the limits herein given, viz: Camp Mojave, Camp Mojave for hay and wood; Camp Verde, Camp Date Creek, Camp McDowell, Camp Grant, Camp Bowie and Camp Crittenden.

HEADQUARTERS OF THE ARMY,
WASHINGTON, *March 28th*, 1870.

Respectfully submitted to the Secretary of War.

W. T. SHERMAN, *General.*

390 WAR DEPARTMENT, *March 30th*, 1870.

Approved and respectfully submitted for the action of the President.

WM. W. BELKNAP,
Secretary of War.

EXECUTIVE MANSION, *March 30th*, 1870.

The reservation- at Camps Mojave, Verde, Date Creek, McDowell, Grant, Bowie and Crittenden, Arizona, as described in the accompanying plats and notes of survey, approved by the Secretary of War, are made for military purposes; and the Secretary of the Interior will cause the same to be noted in the General Land Office, to be reserved as military posts.

U. S. GRANT, *President.*

Case of Military Reservation at Camp McDowell, A. T.

ADJUTANT GENERAL'S OFFICE, *May 21st*, 1870.

March 12th, 1870, the commanding general division of the Pacific, forwarded plats and notes of survey of military reservations in Arizona, including Camp McDowell, with request that they be declared in accordance with the limits therein given, and they were accordingly declared by the President March 30th, 1870.

It was subsequently ascertained, upon examination of the records, that a reservation at Camp McDowell had previously been declared, but no plat or description of its limits could be found on file, and by letter of April 15th, the Commissioner of the General Land Office was requested to furnish this office with such description.

May 13th the Commissioner states that the reservation was de-

clared by the President April 12th, 1867, the boundaries being as follows:

"To include the valley of the River Verde from five miles above to five miles below the flagstaff at the post, to and within two miles of each side of the river." Says that he is not able to furnish
391 any more definite description of the boundaries, as the files of his office do not show that it has yet been surveyed. The reservation as surveyed and last declared, contains about 8,960 acres, or fourteen square mile-, while the reservation as declared in 1867, was ten miles long and four miles wide (*i. e.*, 2 miles each side of the river).

The declaration of the reservation by the President, March 30th, 1870, with boundaries as recommended by General Thomas, therefore acts as a reduction of the reservation as declared in 1867, and as it has been decided that no portion of a reservation can be relinquished or disposed of without the sanction of Congress, attention is respectfully invited to the matter. The papers with the President's endorsement are herewith, having been retained for copies of plats being made in the engineer department. The plat of the Camp McDowell reservation is also herewith, not having been sent to the engineer department with the others.

HEADQUARTERS ARMY,
WASHINGTON, D. C., *May 23d*, 1870.

Respectfully submitted to the Secretary of War.

W. T. SHERMAN, *General.*

Respectfully submitted to the President for his action.

WM. W. BELKNAP,
Secretary of War.

War Department, May 25th, 1870.

EXECUTIVE MANSION, *May 16th*, 1870.

It appearing that a military reservation known as Camp McDowell, in the Territory of Arizona, was duly declared and set apart by the President of the United States on the 12th day of April, 1867, and that proper record of the same was made and now exists in the General Land Office, so much of the executive order of March 30th, 1870, as purports to establish a military reservation at Camp McDowell, Arizona Territory, is hereby recalled.

U. S. GRANT.

392 Mr. SPRINGER: I offer in evidence maps of New Mexico and Arizona, showing the location of the Atlantic and Pacific railroad, and Indian reservations, etc., marked Exhibits Nos. 14*a*, 14*b*, etc., which are as follows:

EXHIBITS NOS. 14 A, 14 B, ETC.

(By agreement the original maps are to be transmitted.)

Mr. SPRINGER: I offer in evidence condensed maps, showing located line, withdrawals, constructed line, grant limits, and Indian reservations on whole line, marked Exhibits No. 14*c*, 14*d*, etc.

EXHIBITS Nos. 14 C, 14 D.

(By agreement the original maps are transmitted.)

(Here insert maps marked pp. 392 A & B.)

Mr. SPRINGER: I offer in evidence executive correspondence touching the question of surveys of lands within the Atlantic and Pacific grant, which is marked Exhibit No. 15, and is as follows:

EXHIBIT No. 15.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1892.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copies of the following-described letters, viz:

1st. Office letter dated August 19th, 1881, and addressed to Hon. J. A. Williamson.

2. Office letter of November 28th, 1881, addressed to Messrs. Britton & Gray.

3d. Office letter dated December 6th, 1881, and addressed to Messrs. Britton & Gray, and

4th. Letter from Hon. H. M. Teller, Secretary of the In-
393 terior, dated July 8th, 1882, are true and literal exemplifications of the original letters, as shown by the records and files of this office.

In testimony whereof, I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, on the day and year first above written.

THOMAS H. CARTER,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 19th*, 1881.

Hon. J. A. Williamson, Esq., Albuquerque, N. M.

SIR: Referring to your communication of the 4th instant, on behalf of the Atlantic and Pacific Railroad Co., proposing to deposit money, under the provisions of secs. 2401–'2–'3 of Rev. Stats. U. S., to secure the survey of certain townships in New Mexico and Arizona, along the line of said company, I have to state that in my judgment the provisions of said sections will not justify me in allowing the application. It is true that a corporation is, for some purposes, considered a resident of the State under the laws of which it was created; but a corporation is never considered resident in the full meaning of the term; and if it can be considered a settler in any sense, it cannot be in the sense in which that term is ordinarily

used in the land laws, and especially in secs. 2401–'2–'3. Therefore I cannot authorize the deposit and surveys as requested.

Very respectfully, N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 28th*, 1881.

Messrs. Britton & Gray, Washington, D. C.

GENTLEMEN: I have considered your application for a reconsideration of my decision of August 19th, 1881, denying the application of the Atlantic and Pacific Railroad Company to be
394 allowed to make deposit for surveys of public land, under the provisions of sections 2401–'2–'3, Revised Statutes, and the act of March 3, 1879, (20 Stat., 352), and also the argument of Messrs. Britton & Gray filed in support of said application.

The privileges granted by said provisions are limited by sec. 2401 to "settlers in any township" who desire to have the same surveyed. If it be true that any person or corporation that causes a township to be settled is a settler of such township, as is argued, yet, unless such settler is residing or located within the township he is not a settler in the township.

Section 2403 provides: "When settlers make deposits in accordance with the provisions of section 2401 the amount so deposited shall go in part payment of their lands situated in the townships, the surveying of which is paid for out of such deposits."

When these provisions became law March 3d, 1871, the only settlers that could acquire any interests in public lands required to be paid for, were settlers actually resident in the township, and who resided upon and improved the lands, and who possessed certain personal qualifications that pertain to individuals, and that cannot be predicated of corporations.

Though I were satisfied that the term settler as used in the public land laws does not always mean a resident, yet it seems to me obvious that the term as used in the statutes under consideration means those residing in the township. Words should be construed in connection with the context in which they are found; for a word standing alone, may have several significations, which when considered in relation to accompanying words and phrases, is clearly limited to one meaning; and sometimes the text clearly shows that a word has not been used in a sense which might otherwise belong to it. But it is always to be understood in the sense in which it is obviously employed in the statute or instrument to be construed. In this case it has been used in the sense of a resident, which is a proper, and the most common meaning of the word, and the sense in which it is more frequently if not invariably used in the public land laws, and in the correspondence and decisions of this office.

The act of March 3d, 1879, amending sec. 2403, Rev. Stat.,
395 provides as follows: "When settlers make deposits in accordance with provisions of sec. 2401, the amount so deposited

shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits; or the certificate issued for such deposits may be assigned by endorsement, and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise."

This amendment does not enlarge the right to make deposits or extend the privilege to any parties not previously authorized to make deposits. The certificates are authorized to be assigned, but they can only be used in payment of lands entered by settlers under the pre-emption and homestead laws. Lands are entered under these laws by those settlers only who possess certain personal qualifications as to age or citizenship, and who have complied with certain requirements as to residence, improvement, etc.

Whether I consider these provisions separately or collectively it appears to me that the term settler, as used in the statutes in question, means actual persons who are residents of the township, and cannot be applied to corporations that are not actual persons, and cannot be considered as residing or as being settlers in a township.

Whether the law is considered as to its terms, its general meaning, or the intention of its framers, I am clearly of the opinion that the Atlantic and Pacific Railroad Company is excluded from its provisions, and therefore adhere to my former decision.

The usual time given for appeal.

Very respectfully, N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December 6th*, 1881.

Messrs. Britton & Gray, attorneys, &c., Washington, D. C.

GENTLEMEN: I am in receipt of your letter of the 2d in-
396 stant, referring to my decisions of August 19th and November 28th, 1881, denying the application of the Atlantic and Pacific Railroad Co. to make deposit for surveys under the provisions of sections 2401–'3, U. S. Revised Statutes, and calling my attention to the alternative proposition of said company to be allowed to make deposit for the surveys named, under the provisions of the act of July 31st, 1876, which enacts that before any land granted to any railroad company shall be conveyed to such company * * * "there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same." * * *

You ask a ruling upon the foregoing proposition, and you suggest that the act of 1876 does not limit the time when, or the mode in which such deposits shall be made; that it provides only that the cost of surveying, etc., shall be paid before the issue of patent for lands earned by construction. And you submit that if the company is will- to advance the necessary cost of such surveys before the same are made there is nothing in the law which denies the privilege asked.

In reply, I have to state that my view of the act of July 31st, 1876, is that before patents are issued to railroad companies for granted lands, such companies are to pay to the United States the cost of surveying; that this refers to the cost of surveys actually made by the United States, and not to an estimated or approximate cost of surveys not actually made; that the law contemplates that the surveys are to be made in the usual manner, under the regular appropriations for such service, and that after this has been done, and the land to which the railroad company is legally entitled has been selected, the cost to the United States of the surveys that have been made, together with the other items of expense payable by the company, shall be paid by the company before the patents issue.

The law does not, in my opinion, contemplate a payment in advance of the actual survey and selection.

Whether a deposit in the Treasury can be made to cover a possible future cost, depends upon whether there is or there is not any law authorizing such deposits to be secured.

397 The Treasury is not made by law a place of general deposit. Moneys can only be received by the Treasury on deposit under the authority of some law of Congress.

I do not find any law that authorizes deposits to be made by railroad companies in anticipation of the cost of survey.

If the deposit could be received there would still be no way in which the money could be drawn out to pay for surveys until Congress should make an appropriation thereof for that purpose.

Very respectfully, N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July 8th*, 1882.

The Commissioner of the General Land Office.

SIR: I have considered the appeal of the Atlantic and Pacific Railway Company from your decisions of August 19th, November 28th, and December 6th, 1881, declining to authorize the deposit of money for surveys along the line of its road:

1st. As a "settler," under sections 2401–'2–'3, Revised Statutes; and

2d. As advance payment of "cost of surveys," under act of July 31st, 1876 (19 Stat., 121). which provides that before any lands granted shall be conveyed "there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same."

The reasons given for your conclusions appear to rest upon sound construction, and your action is accordingly affirmed.

The papers submitted by your letter of December 16th, 1881, are returned.

Very respectfully, H. M. TELLER, *Secretary.*

Mr. SPRINGER: I offer in evidence decision of Commissioner of General Land Office, October 13th, 1877, denying the right
398 of the Atlantic and Pacific Railroad Company to lands in

the Indian Territory, which is marked Exhibit No. 16, and is as follows:

EXHIBIT No. 16.

Atlantic and Pacific Railroad Company.

Discussion upon the Claim of this Company to Lands in the Indian Territory.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct. 13th*, 1877.

Hon. Carl Schurz, Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt of letter of August 28th, 1877, from W. H. Coffin, president of the Atlantic and Pacific Railroad Company, to the President of the United States, demanding that lands along the line of that company's road in the Indian Territory, between the western boundary of the State of Missouri and the town of Vinita, be surveyed, and that patents be issued to the company for such of the lands as are claimed by it under the act of Congress approved July 27th, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast." (14 Stats., p. 292, etc.)

This letter having been referred to you, is transmitted to me "for report as to the condition of lands for which patents are demanded, and reason, if any, why the demand cannot be complied with." In returning it to you, I therefore submit the following statement:

The condition of the lands in what is usually denominated the Indian Territory, is that of lands to which the ultimate fee is vested in the United States, but which, by treaty stipulations, statutory enactments, and executive acts thereunder, have been set apart and reserved for the sole use and occupancy of certain Indian nations and tribes, so long as their national or tribal organizations are preserved.

399 The boundaries of this section of country are defined only by the terms of the various treaties with these nations and tribes, and by the legislative action which has prescribed the limits of the contiguous States and Territories of the Union. Over it the public land system has never been extended, nor has any action ever been taken by Congress looking to its survey as public land.

Much of it is held by four nations—the Choctaw, Chickasaw, Cherokee and Creek, to whom patents have been issued in accordance with the requirements of laws and treaties, and who exercise within their respective boundaries full control, subject only to such supervisory power by the United States Government as may be deemed necessary for the public peace, and all attempts to induce Congress to erect it into a Territory of the United States have heretofore failed.

This statement of the condition of the land is, I think, sufficient to show that, even had the act of July 25th, 1866, made a grant to the Atlantic and Pacific Railroad Company of lands in the Indian Territory, the department would be powerless to carry it into effect without further legislation, and for that reason the company's demand could not be complied with.

But, in addition, I think the demand cannot be complied with for the reason that the company has no grant of lands in the Indian Territory; that, without entering upon the question of the intent of Congress to make a present grant of such lands, which I do not understand the company to claim, an ultimate grant, even, was not conferred by the act, except as such grant might be acquired from the Indians by the company.

I have arrived at this conclusion after careful consideration of the law making the grant to the company.

The first section of the act creates the Atlantic and Pacific Railroad Company, and authorizes it to locate and construct "a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri; thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be *be* determined by said company to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence by way of the Agua Frio, or other suitable paths, to the head-waters of
400 the Colorado Chiquito, and thence along the thirty-fifth parallel or latitude, as near as may be found most suitable for a railway route to the Colorado river at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly along the most suitable route as selected to a point in the western boundary line of Arkansas, at or near the town of Van Buren."

The second section grants the right of way through the public lands and exempts such right of way from taxation within the Territories of the United States.

The final clause of this section further provides that "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in the act."

The third section grants to the company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any States, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said

road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office," with indemnity within ten miles further for lands lost through the grant.

The fourth section enacts, "That whenever the said Atlantic and Pacific Railroad Companies shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated," (and when such section has been reported upon by commissioners as constructed in accordance with law),

"patents of lands as aforesaid, shall be issued to said com-
401 pany, confirming to the said company the right and title to said land situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed * * * then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

The sixth section prescribes, "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad." * * *

The eighth section says, "That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the 4th day of July, anno Domini 1878."

By the ninth section it is further enacted, "That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

Under the seventeenth section, "The said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance, which may be granted by any * * * Indian tribe or nation through whose reservation the road herein provided for, may pass. * * *

"Provided, that any such grant or donation, power, aid,
402 or assistance, from any Indian tribe or nation, shall be subject to the approval of the President of the United States."

The company duly filed its acceptance of the terms of the act and maps of its general route from Springfield, Missouri, to the Pacific coast. It has purchased and completed the construction of a road from Pacific City, near St. Louis, to Springfield, and has constructed

one hundred and twenty-five miles of its road, beginning at Springfield, Missouri, and ending at Vinita, in the Indian Territory.

The last fifty miles of constructed road, of which thirty-three are in the Indian Territory, were accepted and approved by the President, December 6th, 1871, since which time this office has no knowledge of further construction of work upon the line.

The demand of the company for survey and patenting of the lands in the Indian Territory, east of Vinita, is based upon the fourth and sixth sections of the act.

If these sections could be detached from the remainder of the act and considered by themselves, or in the connection only with the last clause of the second section; if there were no limitations to the grant as made by the third section, and if the seventeenth section was not part of the law, there might be plausibility in the claim that the requirements of the fourth and sixth sections were mandatory, and that, despite the character of the lands and the failure of Congress to provide in the usual manner for their survey, they should have been surveyed and patented to the company as fast as the road was constructed. But, on considering the law as it was enacted and approved, as a whole, it seems to me that the claim is without foundation or warrant.

On consideration of the third section it will be seen that land to pass under the grant must be in the following condition:

It must be public land situated in a Territory or State of the United States, to which the United States possesses full title, and which is not reserved or been sold, granted or otherwise appropriated, at the time the map of the company's line of route is filed in this office.

It may — stated as a fact, without argument, that lands
403 in the Indian Territory are not public lands in the usual meaning of the term, and are not situated in a State or Territory of the United States; that the United States does not, certainly so far as lands within the boundaries of the Choctaw, Chickasaw, Cherokee and Seminole nations are concerned, possess full title to them, and that they are and have been for a period commencing anterior to the year 1866, set apart and reserved by the United States for the sole use and occupancy of various Indian nations and tribes.

And this statement disposes of the claim that the lands in question were included, or will be hereafter, in any grant of the United States, under the third section of the act.

I am further led to the conclusion that no grant of lands in the Indian Territory was contemplated by the act, except such as might be acquired by the company from the Indian holders and occupants, by the term of the seventeenth section: "That the said company is authorized to accept to its own use any grant * * * by any Indian tribe or nation through whose reservation the road herein provided for may pass. * * *

"Provided, that any such grant * * * from any Indian tribe or nation shall be subject to the approval of the President of the United States," is the privilege conferred by the law, and it is in the

event of such a grant being made to the company by any of the Indian nations or tribes having the power to do so, that, in my opinion, the last clause of the second section becomes applicable, and

"The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in the act."

That the company at the outset acted upon this construction of the law is fully shown on examination of the files of the department, for I find therein a communication from Lewis Downing, principal chief of the Cherokee nation, with which, under date of 6th December, 1869, he transmitted to your predecessor an official copy
404 of a resolution adopted by the national council of the Cherokee nation, November 29th, 1869, declining to comply with the request of the Atlantic and Pacific Railroad Company, formerly presented in a memorial "for a grant of land, aid and assistance in money, to facilitate the building of said railroad."

There is also a letter from Francis B. Hayes, Esq., president of the company, to Secretary Delano, dated November 29th, 1870, in which he says:

"Under its treaty with the Cherokee Indians the right of way is given to this company, representing the east and west road through the Cherokee reservation, but the United States, though giving this company by its charter a right of way for the entire length of its road, has not secured for the company the right of way from the small tribes occupying that portion of the Indian Territory lying between Grand river and the State of Missouri, being a distance of about eight and one-half miles within the Indian Territory and immediately east of the Cherokee reservation. * * * Having been permitted by the Secretary of the Interior to open negotiations with the small tribes of Indians occupying the land between Seneca, in Missouri, and the Grand river, in view of obtaining the right of way and other lands and privileges for railroad purposes, as authorized by its charter, this company finds a friendly disposition manifested by the Shawnee- and Wyandottes to allow the company what is desired.

"I now have the honor to respectfully ask, in behalf of the Atlantic and Pacific Railroad Company, * * * permission to continue negotiations with the Indian tribes for the right of way, depot lands, and other privileges, for railroad purposes, subject to your approval."

And further, the company filed a bond conditioned for the protection of the rights of the several Indian tribes through whose territory the line of the road was designed to pass, which bond was approved March 16th, 1871.

It also entered into contract with the Shawnee and Wyandotte Indians for right of way through their reserves, and gave
405 similar bond, both contract and bond being approved by President Grant, March 16th, 1871.

These facts show that the right of way through the Indian Terri-

tory is guaranteed to the company by the treaties of 1866, with the Cherokees, Creeks and Seminoles, and by the contract of 1871, between the company and the Shawnees and Wyandottes. In neither the treaty nor the contract, however, was a grant of land made by any of these nations or tribes, nor, until now, has the company ever claimed that it had a grant of land in the Indian Territory. On the contrary, its entire action heretofore has been in consonance with the construction of the law by which the United States is held to have agreed to confirm (within certain limits) such grant of lands as the Indian nations or tribes might make to the company, and to thereupon extinguish the Indian title to the lands so granted.

The company not having received any such grant, occasion for the extinguishment of the Indian title has not arisen, and consequently there is no reason for the survey of the lands in question, much less the issue of patent therefor to the company.

For a particular statement regarding the right of railroads to pass through the Indian Territory, I beg leave to call attention to your predecessor's letter of May 21st, 1870, to the President, a copy of which I herewith enclose.

Although he says therein, page 4, " it was admitted by all parties that the acts of Congress of July 25th, 26th and 27th, 1866, granting lands and privileges to the Kansas and Neosho road, the Southern branch Union Pacific road, and the Atlantic and Pacific road, respectively, and the several Indian treaties referred to, were all essentially parts of the same transaction, and were to be taken and construed together for the purpose of determining the scheme which was intended to be legalized by Congress," you will note that the sole question under consideration was which or how many of these companies had the right of way through the Indian Territory, and he did not intend to assert or decide that the Atlantic and Pacific Company had a grant of lands through the Territory.

406 Examination of the acts making grants to these companies shows that not only were the Kansas and Neosho Valley and the Union Pacific railway, Southern branch, Companies allowed to acquire lands in the Indian Territory from the Indian tribes or nations, but that there is a distinct section in each law, as follows:

"SEC. 9. That the same grants of lands through said Indian Territory are hereby made, as provided for in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, that said lands become a part of the public lands of the United States." This shows that Congress intended to make an ultimate grant to the company of lands in the Indian Territory, if such lands become public lands of the United States, whether the company succeeded in obtaining a grant from the Indian nations and tribes, or not.

But no such language is found, or intent displayed, in the grant to the Atlantic and Pacific railroad. All that was there given, in addition to the right of way, which was provided for in the treaties already executed or then being negotiated, was the privilege of procuring a grant from the Indian tribes or nations, and in the event

of such a grant, the Indian title to the granted lands was to be extinguished.

Nor can it be successfully claimed that the intent of Congress to grant lands held by Indians, is as clearly manifested in the Atlantic and Pacific act, as it was in the Union Pacific and Northern Pacific acts.

The second section of the act of July 1st, 1862, 12 Statutes, 491, making a grant to the Union Pacific Railroad Company, says:

"The United States shall extinguish, as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made," whilst by the second section of the Northern Pacific act, the United States is required to "extinguish as rapidly as may be *consistent with public policy and the welfare of the said Indians*, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

407 The italicized language shows wherein the Northern Pacific differs from the Union Pacific act, in respect to the extinguishment of Indian title, and that its operation is circumscribed and restricted by considerations of public policy and the welfare of the Indians claiming and holding the lands.

Neither of these companies, however, were authorized to negotiate with the Indians for any purpose. Their roads were designed to run through that portion of the country claimed and held by roving tribes of Indians, and the Government bound itself to extinguish the Indian title to such lands.

Yet neither of these companies have ever set up the claim that any lands were granted to them within the limits of an Indian reservation, made by law, treaty or executive order.

The second section of the Atlantic and Pacific act differs materially from those before referred to. It says: "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, *and only by their voluntary cession*, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act." Its triple requirements are, first, consideration of public policy; second, due regard to the welfare of the Indians; and third, their voluntary cession of the lands.

As none of the lands in question have ever been ceded or granted by the Indian nations or tribes holding and occupying them, it is clear to my mind that the company has not the shadow of a claim therefor, under the act of 1866.

Further discussion of the question is, I think, unnecessary. I therefore return the letter of Mr. Coffin, with this as my report on the subject.

Very respectfully, your obedient servant,

J. A. WILLIAMSON,
Commissioner.

Mr. SPRINGER: I offer in evidence the deposition of J. A. W. Williamson, land commissioner of Atlantic and Pacific Rail-

408 road Company, touching various matters in the history of the railroad; the efforts of the company to build its road, the failure of the Government to perform its obligations to the company under the act of Congress, and the obstructions placed in the way of completing the road, which is marked Exhibit No. 17, and is as follows:

Mr. FORT: We object to all that part of Mr. Williamson's testimony, purporting to show failure of the Government to perform, etc., as incompetent, irrelevant and immaterial, and move that it be stricken out and not given to the jury.

The COURT: It may go in subject to objection and exception. I will rule on it later.

EXHIBIT No. 17.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

In the District Court for the Fourth Judicial District, Sitting within and for the County of San Miguel.

THE ATLANTIC & PACIFIC RAILROAD CO. }
vs. } Ejectment. No. —.
ROBERT MINGUS. }

Interrogatories Propounded to J. A. Williamson, Witness on the Part of the Plaintiff, and His Answers Thereto.

Interrogatory 1. State your name, age, residence, and occupation?

Answer. My name is James A. Williamson, age 63, legal residence Des Moines, Iowa, temporarily residing in Chicago; occupation at present time, land commissioner of the Atlantic and Pacific Railroad Company.

Interrogatory 2. Are you acquainted with the parties to this suit?

409 Answer. I am acquainted with The Atlantic and Pacific Railroad Company, plaintiff in this case, but not with Robert Mingus, defendant.

Interrogatory 3. What official positions, if any, have you held in the Atlantic and Pacific Railroad Company?

Answer. I have held the following official positions in the Atlantic and Pacific Railroad Company: Land commissioner, general solicitor, assistant to the president, and president.

Interrogatory 4. State whether or not by reason of holding said positions you have become familiar with the affairs of said railroad company?

Answer. Yes, I think I have become familiar with the affairs of said railroad company.

Interrogatory 5. State whether — not you are acquainted with the operations of the Atlantic and Pacific Railroad Company, under the act of Congress of July 27th, 1866, and with the questions aris-

ing between said company and the Government of the United States in relation to the building of its road, and in relation to the grant of lands made by said act?

Answer. Yes, I am acquainted with the operations of the Atlantic and Pacific Railroad Company, under the act of Congress of July 27th, 1866, and the questions arising between said company and the Government of the United States, in relation to building its road, and in relation to the grant of lands made by said act.

Interrogatory 6. If you say you are acquainted with the matters mentioned in the last interrogatory, please now go on and state in detail the history of the operations of said company, under the act of Congress alluded to, setting forth particularly what acts were done by said company towards the acceptance of the terms of said act of Congress, the location and construction of its road,
410 and the various expenditures of money for said purposes, and all other acts done by said company in order to avail itself of the rights and benefits granted by said act of Congress up to the 6th day of July, 1886?

Answer. On July 27th, 1866, Congress passed the act creating the Atlantic and Pacific Railroad Company, and granting it certain rights, powers, franchises and lands to aid it in building a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast. The points from, through, and to which, the company must build its railroad and telegraph line were stated with all the precision practicable. Points of junction for main and branch lines were approximately fixed; certain streams and passes were named which must be traversed or passed through or over, by the road, and where points could not be more definitely fixed the company was required to adopt the most practicable route, as near to the 35th parallel of north latitude as could be found. There was no great uncertainty at any point as to where the road must be built in compliance with the act of Congress. The commissioners named in the act met soon after its passage in 1866, and elected officers, opened subscription books, subscribed for the stock, and took all the other preliminary steps for the organization prescribed by the act of Congress, and the company duly filed its acceptance of the provisions of said act. It immediately put into the field a corps of competent engineers and explorers to survey and definitely locate the best line from Springfield, Missouri to the Pacific ocean. This was done at great expense and under circumstances of much difficulty. Most of the route ran through a country then filled with hostile Indians, and concerning which but little was reliably known. The work was accomplished as rapidly as unflagging energy and liberal expenditure of money could insure. The plats of definite location were filed as soon as practicable, in the General
411 Land Office, and the lands granted along portions of the line were duly withdrawn by the executive department from sale or other disposal, for the purposes named in the act of Congress. The line was thus located from Springfield, Missouri, to the west line of the State December 17th, 1866; from Missouri State line to Kingfisher creek, Indian Territory, December 2d, 1871; from Van

Buren, Arkansas, to Canadian river, Indian Territory (branch), December 2d, 1871; from point last named to junction with main line (branch), February 7th, 1872; from Kingfisher creek, Indian Territory, to eastern boundary of New Mexico, February 7th, 1872; through the Territory of New Mexico, March 12th, 1872; and the lands within the forty and fifty mile limits across the Territory of New Mexico were withdrawn from entry and sale by the letter of the Secretary of the Interior of May 8th, 1872, to take effect from March 12th, 1872; through the Territory of Arizona, March 12th, 1872; and lands within the forty and fifty mile limits across that Territory withdrawn by letter of Secretary of the Interior, May 17th, 1872, to take effect from March 12, 1872; from San Francisco to San Miguel mission, March 12th, 1872; lands withdrawn by letter of Secretary of the Interior, April 22d, 1872, to take effect from March 12th, 1872; from western line of Los Angeles county, California, to a point in township 7 north, range 7 east, San Bernardino base and meridian, March 12th, 1872; and lands withdrawn by letter of April 22d, 1872, to take effect from March 12, 1872; from San Miguel mission to western line of Los Angeles county, and from township 7 north, range 7 east, San Bernardino meridian, to the Colorado river, August 15th, 1872; and lands withdrawn November 23d, 1874, to take effect August 15th, 1872.

412 There was no railroad from any point reaching Springfield, Missouri, the initial point of the road as fixed by the act of Congress. It was found that to carry on the work of construction it was necessary to have an outlet to the markets of St. Louis and the transportation facilities of the Mississippi river; and, therefore, the Atlantic and Pacific Company, in October, 1870, purchased the South Pacific railroad, then built from Pacific City, (37 miles west of St. Louis), to Springfield, in Missouri, and at once commenced construction from Springfield westward.

The road was completed and opened for traffic from Springfield to Neosho, on December 1st, 1870; to Seneca on the western boundary of Missouri, April 1st, 1871; and to Vinita, in the Indian Territory, September 1st, 1871. The distance from Pacific City to Vinita is about 327 miles, and from St. Louis about 364 miles; and from the western boundary of Missouri to Vinita about 34 miles.

On July 24th, 1871, the President appointed commissioners to examine and report on the fourth and fifth sections of twenty-five miles each of completed road between Springfield, Missouri, and Vinita, in the Indian Territory. On December 4th, 1871, the acting Secretary of the Interior forwarded the report of the commissioners to the President, who, on the 6th of the same month, approved the same, together with the recommendation of the Secretary that patents be issued for the land earned by constructions of said sections of completed road. At the date of definite location of the line from Springfield, Missouri, to the west line of the State there was but little unappropriated public land available under the grant to aid in building the road. From the west line of the State to the 98th meridian of west longitude the Indian title to the grant of land had not been extinguished, and consequently was not avail-

able to the company to aid it in construction. Owing to these facts it was found difficult, if not impossible, to get money subscribed, either for the stock or bonds of the company, to continue the
413 road. In addition to this, it encountered numerous obstacles in building its road into the Indian Territory; its surveying and engineering parties were stopped by Indian agents, under the orders of the Secretary of the Interior of May 13th, 1870, from proceeding with the construction of the road, and the company was unable to proceed with these operations until March, 1871, and then only upon executing a bond in the sum of a half a million dollars, conditioned for the protection of the rights of Indian tribes through whose territory the line of road was required by the act of Congress to pass.

For these reasons the company was compelled to stop work, and to appeal to Congress to make good that which the Government had promised in the act of 1866. This was done in May, 1871, and Congress was therein asked to take the necessary steps to put the grants of way, of materials and of lands, in condition for use for the purpose of constructing the road. This petition was without effect, and nothing has ever been done by the Government in that direction. The prescribed route of the road ran for about 350 miles through the Indian Territory, and thereafter in Texas, New Mexico and Arizona, through some Indian reservations, and most of the land westward from the Indian Territory to the Colorado river, was, in 1866, unsurveyed, and was either taken up by unadjusted Mexican lands claims, or occupied by Indians, more or less hostile.

By the 4th of July, 1878, the company had constructed only 125 miles out of about 2,000 miles contemplated for the entire line, and in addition thereto had purchased at a cost of over seven millions of dollars the South Pacific road, as above stated. The entire construction account of the company up to this point amounted to $10,673,000.

The financial panic of 1873, and the continued failure of
414 the United States to put the company's grants in condition for use, by extinguishment of the Indian titles, rendered it impossible for the company to make any substantial progress with its road for many years. Capitalists could not be induced to advance money on the faith of a grant of lands which the company could not then dispose of to settlers, by reason of existing Indian titles; and the operations of the company were therefore paralyzed, until about the beginning of 1880, when the company made such financial arrangements as enabled it to resume the work of construction. In order to do this, however, it had to give up operations in the Indian Territory, and by making a connection with the Atchison, Topeka and Santa Fe, whose constructed road had then reached the line of the Atlantic and Pacific, in Albuquerque, New Mexico, it became for the first time practicable to build westward to the Pacific ocean, and avoid many of the obstacles and hinderances which had been encountered in the Indian Territory.

Taking advantage of this opportunity, the Atlantic and Pacific Railroad Company, on January 31st, 1880, entered into an agree-

ment with the St. Louis and San Francisco Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company, wherein, among other things, it was agreed that the Atlantic and Pacific Company should at once begin, and as soon as practicable complete its road from Albuquerque, New Mexico, to the Pacific ocean, at San Francisco, and when completed the three roads should be operated in conjunction from the Mississippi and Missouri rivers, to San Francisco. The agreement also stipulated that the St. Louis and San Francisco, and the Atchison, Topeka and Santa Fe Companies, should endorse the first-mortgage bonds of the Atlantic and Pacific Company, and guarantee the payment of interest thereon, by setting apart a certain portion of their respective earnings for that purpose. The bonds were also secured by a mortgage,
415 executed under the act of Congress of April 20th, 1871, authorizing the Atlantic and Pacific Railroad Company to mortgage its road and land, and this mortgage covered all the rights, privileges, grants and franchises of the Atlantic and Pacific Company, between Albuquerque and San Francisco, to which mortgage the bondholders were first required to resort. Previous to this time, by reason of its purchase of the South Pacific railroad, and the building of the road thence westward in the State of Missouri and in the Indian Territory, the company had incurred a debt of $10,291,499, secured by mortgages on the road, and all the franchises, grants and property of the company, situate between the west line of Missouri and the town of Albuquerque, on the Rio Grande. These mortgages were likewise executed, pursuant to the act of Congress of 1871, authorizing them.

Under the aforesaid agreements with the St. Louis and San Francisco, and the Atchison, Topeka and Santa Fe railroads, it became again possible to negotiate a sale of the bonds of the Atlantic and Pacific road. Accordingly they were sold at par in the year 1880 to the amount of ten million dollars. The work of construction was at once pushed from the junction of the Atlantic and Pacific railroad with the Atchison, Topeka and Santa Fe railroad, at Isleta, N. M., westward, with all possible speed; it had been steadily prosecuted on this part of the line, and was, prior to July 6th, 1886, completed to The Needles, at the eastern line of California, a distance from Isleta of about 560 miles. All this part of the line has been examined by Government commissioners, excepting the fractional last section, and accepted by the President. In addition, 62 miles westward from Vinita, in the Indian Territory, had been similarly constructed and equipped, and fifty miles accepted. The amount expended by the company for these additional 622 miles amounted to sixteen million dollars. It had also acquired by contract
416 of purchase, at an expense of about $7,290,000, about two hundred and forty-three (243) miles of road, extending from the Colorado river directly through the Mojave desert to Mojave, in California; these 243 miles of road having been built nearly exactly on the line of the definite location of the Atlantic and Pacific Company from Mojave. By a trackage contract with the Southern Pacific the Atlantic and Pacific has the right to run its own cars to

San Francisco, and to conduct to that point an independent and competitive freight and passenger business.

The whole distance of the original line thus constructed from Springfield westward amounts to 747 miles. This, added to that purchased of the South Pacific railroad, from St. Louis to Springfield, and that purchased from the Southern Pacific, from The Needles to Mojave, makes a total of about 1,228 miles of constructed road, fully equipped, and in active operation prior to July 6th, 1886. In addition to this there should be considered the 200 miles of road from Waterman to San Diego, operated in connection with the Atlantic and Pacific, to make a continuous road from Albuquerque to the Pacific ocean. To accomplish this, the Atlantic and Pacific Company has incurred a bonded debt of about thirty-one million five hundred thousand dollars, secured by mortgages upon its road, land grant, franchises and income, issued at different times up to March 1st, 1882. The money has been fairly and honestly expended. There has been no construction company, or other organization of middlemen to profit by the work of construction; the road is built first-class in all respects, the track is of steel rails weighing 56 pounds to the yard; pile bridges had to be used temporarily, but are now being replaced in large part by the best wrought-iron bridges; in Albuquerque the company has located very large machine shops, round-houses, depots, storehouses and
417 general offices: sidings, water tanks and station-houses have been built at convenient distances; all the work having been done in a first-class manner, and of the best material. At Canon Diablo an iron trestle bridge has been built more than five hundred feet in length and two hundred and twenty-five feet high, at a cost of about $300,000. At Johnson's cañon an expensive bridge has been constructed at great cost; the company deeming it best to bridge in the most substantial and permanent manner the deep coñons which cut up the country through which the road has been constructed. It has encountered numerous difficulties in maintaining a bridge across the Colorado river at The Needles, successive structures having been carried away by floods, until the company was compelled to construct a very large and expensive iron cantilever bridge, at a cost closely approximating a million dollars.

Although by means of these various operations, and the arrangements made with friendly companies, the Atlantic and Pacific Railroad Company has now secured a line for continuous business from St. Louis to the Pacific ocean, nevertheless, its own actual line of constructed road still remains in disconnected sections. The business which it actually does over those sections is at a great disadvantage on account of the increased mileage occasioned by the necessity of hauling a part of the distance over other roads, not located upon its own line. It has not yet been able and will never be able to do the business which was contemplated by the act incorporating the company, until its entire road along the located line thereof shall have been completed, so as to make one continuous line. It can neither transport freight nor passengers as cheaply or expeditiously under the arrangements which it has been compelled

to make as it could if the intervening gaps upon its line were closed up, and a continuous line of railroad built and operated as
418 contemplated by the act of Congress. By reason of these facts, the company has derived no profit from the building or operating of the above-mentioned parts of its road; on the contrary, it has not paid its operating expenses, and the company has not only been a heavy borrower for construction purposes, but also for operating expenses, interest on fixed charges, taxes and insurance. For instance, during the period from November, 1883, to November, 1885 inclusive, the earnings of the entire road did not even pay operating expenses; the earnings for that time being $2,765,415.35, and the operating expenses $2,815,632.90, thus resulting in a net loss of $50,217.55. The Western division, since it was opened for traffic between Albuquerque and The Needles, and extended from The Needles to Mojave by purchase from the Southern Pacific, has not earned enough to pay its operating expenses and fixed charges by about six millions of dollars.

Interrogatory 7. State what constituted the several divisions of said road known as the Eastern, Central and Western divisions? Give the termini of each, and state the length of road constructed in each division previous to July 6th, 1888, if you have not already done so?

Answer. The Central division embraced all that part of the line lying between Seneca, on the west line of the State of Missouri, and Albuquerque, on the Rio Grande, in New Mexico.

The Western division embraced all of the line of the road from Albuquerque to San Francisco. I do not recall the fact that there was an Eastern division of the road, so called, but if there was, it must have been that portion of the line between Springfield, Missouri, and Seneca, on the west line of the State. If this was called the Eastern division, or whether it was so called or not, the entire line from the town of Springfield to the town of Seneca was fully constructed prior to the year 1871.

419 Of the Central division, that is to say, from Seneca, on the State line of Missouri, to the present terminus of the road at Sapulpa, about 112 miles have been built and equipped. The last section or fractional part of the section has not been accepted by the Government because it was less than twenty-five miles in length, and the President has not been requested to appoint commissioners.

Of the Western division, about 560 miles have been built, and 550 miles have been examined by commissioners appointed by the President, and accepted by him on the report of such commissioners. The last section of about twenty-five miles has not been accepted, nor has the President been requested to appoint commissioners to examine it, for the reason that it is short of twenty-five miles, and the question has been, and still is pending, whether or not the 243 miles lying between The Needles and Mojave, in the State of California, shall be examined by commissioners as road constructed by the Atlantic and Pacific Railroad Company, through the agency of the Southern Pacific Company, or whether the South-

ern Pacific Company will succeed in having commissioners appointed to examine it as road constructed by it.

Interrogatory 8. State whether or not the Government of the United States has complied with the several obligations and undertakings on its part, contained in the said act of Congress of July 27th, 1866.

Answer. No, the Government of the United States has not complied with its several obligations and undertakings on its part, contained in the act of Congress of July 27th, 1866.

Interrogatory 9. If you state that the Government has not complied with all the obligations referred to in the last interrogatory, please go on and state in detail wherein it has failed to do so, and set forth in particular all the facts accessible to you, or within
420 your knowledge, touching any acts or omissions that may be referred to by you in your answer.

Answer. The most important obligations assumed by the Government in the act incorporating the company, were to extinguish the Indian title to the lands within its grant limits, and to survey the lands. Both were indispensible to the complete utilization of the grant by the company. The general route of the road was prescribed in the act of July 27th, 1866, and from the west line of Missouri it was required to run for about 350 miles through the Indian Territory. The realization of aid from the grants pledged by Congress to secure the construction of the road, and the possibility of reimbursement by profitable trade in the operation of the road when constructed, were necessarily dependent upon a promised change in the legal condition of the land titles along the line of the prescribed route. The United States has not even attempted to fulfill its promises to extinguish the Indian titles. It has never commenced to put the land grant into condition to be sold, pledged or otherwise utilized, as a means of raising money for construction purposes; on the contrary, it has still further incumbered these titles.

In the year 1866, and but a short time before the passage of the act of July 27th, 1866, the Indian title had been extinguished to much of the land embraced in the grant to the Atlantic and Pacific Company west of the 98th meridian of west longitude; but instead of keeping these lands free from Indian title and occupancy, the Government afterward proceeded to place various Indian tribes thereon, in such a manner as to absolutely prevent the company from deriving any benefit from the land grant itself, and also in many cases to interfere with and for considerable periods of time, absolutely suspend the work of construction. None of the Indians last referred to were there when the grant was made, nor
421 many of them when the road was definitely located; and yet these same Indians, occupying lands which had been granted to this company, afterwards, in many instances, interfered with and stopped its engineer parties, compelling the suspension of the work of surveying and entailing upon the company large expense and much delay in the prosecution of its work. In one instance in the Indian Territory its surveying party was stopped for a period of

one hundred days, which was the time required to get an answer from the Secretary of the Interior permitting them to go on.

In 1868 and 1869, the Government located the Cheyennes and Arapahoes directly across the prescribed route of the road in the Indian Territory, and guaranteed their exclusive right of occupancy. The Navajoes were located over a large portion of the grant in New Mexico and Arizona, with similar guarantees. Their reservation covers several millions of acres, and was established by treaty of June 1st, 1868, and executive orders of October 29th, 1878, January 26th, 1880, and May 7th, 1884. The extension or increase of area bears date long after the road was built and accepted. The Fort Wingate military reservation was located across the track, and the officer in command would not allow the company to cut timber either from the reservation or from land not embraced in, but contiguous to it, until after a long and expensive delay on appeal to the Secretary of War, who took a long time to decide that the company had a right under its grant to the timber in that locality.

The Zuni Indian reservation in New Mexico was established by executive orders on March 16th, 1877, five years after the definite location of the road, and it was extended from time to time after the road was built, over lands granted to and owned by the company.

The Moqui Indian reservation was established December
422 16th, 1882, about two years after the road was built and accepted, and the land fully earned by the company.

The Hualapai Indian reservation was established by executive order January 4th, 1883, after the road was built and accepted. It was so established as to include about twelve miles of road with the land grant opposite the same, together with one of the most important towns on the line in Arizona.

These and other reservations, which had no existence at the date of the definite location of the road, and in some cases not until after their road was built, embrace in their aggregate over two and one-half millions of acres lying within the limits of the Atlantic and Pacific grant, and the executive department of the Government refuses to recognize the right of the company to any of it. On account of the close proximity of the main body of the Navajoes to the road, and the great number of animals which they own, and their inclination to leave their reservation to graze their herds all over the country, they have practically destroyed the value of a large part of the company's land in that region. They are vicious and lawless neighbors, and by their depredations they have driven most of the neighboring stock-raisers from the country. In the case of all these reservations it is to be observed that they not only deprive the company of the enjoyment of the land grant, but they also, in the large areas covered thereby, have, in many cases, blocked the right of way and destroyed our ability to obtain materials for construction from lands contiguous to the line. The establishment of these Indian tribes, directly upon the prescribed and located line of the road, has also had the effect to render the whole region in the neighborhood of such reservations absolutely uninviting and forbidding to immigration and settlement, so that there has been no possibility in these

localities for any considerable development of the country,
423 or the creation of a local business upon which the revenues of a railroad so largely depend.

The 6th section of the act of July 27th, 1866, provides that the land embraced within its grant shall be surveyed as fast as the road is constructed, or as needed to aid in construction. As I have already stated, the road from Albuquerque westward through New Mexico and Arizona, was completed long prior to July 6th, 1886. The alternate sections of lands within the grant limits opposite such constructed road were thereby earned, and the company was entitled to have them surveyed and patented with all reasonable speed. This the United States has entirely failed to do. The company has made every effort within its power to induce the United States to survey and patent the granted sections along this part of its grant. This was an absolute necessity, in order to enable the company to utilize its grant for the purpose of raising money. So long as the lands are unsurveyed it is impossible to sell them, or realize money out of them in amounts at all commensurate with the extent of the grant. While the land grant in its undefined condition may be subjected to a general mortgage, as has in fact been done, nevertheless the company is unable to put the lands on the market and realize money from their sale, to apply to payment of the interest or principal of its bonds. There is no segregation of the particular sections inuring to the grant from the adjacent mass of public lands where they are unsurveyed. We could not even distinguish the odd sections which fall to the company, from the even sections which remain to the Government within the grant limits. Hence the company was hampered in its location of stations, depots and other permanent improvements; it can make no titles to purchasers; it cannot invite settlements so long as the land titles cannot be perfected, nor the ownership of the lands be identified; it is idle
424 to hope for any substantial improvement in the condition of the country through which the road passes; or any considerable development of carrying business for the road.

The repeated requests of the company to have its earned lands surveyed and patented have not been complied with. The company has asked the Interior Department to permit it to deposit the requisite moneys under the special deposit law, for the survey of a part, but this was refused; then, as the law required the company to refund one-half of the cost of surveys before issue of patents, the company offered to advance a large amount necessary to make certain surveys, and let it stand as a credit to be adjusted when patents should issue. Both of these requests have been denied, so that the Government has not only failed to do what it agreed to in the matter of surveys, but has refused to allow the railroad company to do the same primarily at its own cost. Even at this time, upon the earned land appurtenant to its constructed road, the United States have only issued patents for 406,136.74 acres, and of this amount only 23,037.36 acres had been patented up to July 6th, 1886. The quantity of land earned by the construction of the road, and to which the company was entitled on July 6th, 1886,

under the terms of its grant, amounts to about 14,336,000 acres, of which quantity about 5,356,670 acres remained at that date unsurveyed and unpatented, and very nearly the same area remains in that condition now.

The land grant, therefore, as a body, remains unavailable to the company for the purpose for which it was intended.

Another act of the executive department of the Government, which greatly tended to discourage the prosecution of further construction, and the completion of the Atlantic and Pacific railroad, was the act of the Commissioner of the General Land Office,
425 and the Secretary of the Interior, in restoring to settlement the large quantity of valuable land in the State of California, from the western terminus of constructed road to San Francisco. This was done after a previous Secretary of the Interior, Attorney General of the United States, had decided that the grant extended to San Francisco, and the lands had been by executive order withdrawn for the benefit of the company to that point.

The history of the efforts of this company to build its road might be told in a different and more voluminous way than hereinbefore attempted. A true history of the case would disclose the failure of an enterprise, designed for the development of many of the States and Territories of the Union, because of the failure or refusal of the Government of the United States to keep and perform its agreements, as a contracting party. The justification of the above statement may be briefly recapitulated as follows:

When this company, as early as 1868, had acquired and completed the South Pacific road to Springfield, in the State of Missouri, and then before the expiration of the year 1871, had built to Vinita, in the Indian Territory, and could go no further because the lands granted in the Indian Territory were not made available to aid it as they should have been, and the company appealed to the Government to make the granted lands available; no attention was paid to the appeal, but, on the contrary, lands west of the 98th meridian were incumbered by settling other tribes of Indians across its right of way, and on the grant of land. It was represented to the Government that it was at least 555 miles from the east boundary of the Indian Territory to the line of New Mexico, for which there would be no land to aid in construction, if it did not make those in the Indian Territory available, and that under the circumstances the company could not go on with the work. No relief
426 being obtained in response to this appeal, work was necessarily suspended, and finally, in 1876, all of the company's constructed road, except that in the Indian Territory, was sold under foreclosure of mortgages. From 1876 to 1880, nothing more was or could be done by the company, except to renew its appeals to the Government to make the lands in the Indian Territory available, so that it could resume the work of construction, but without success.

In 1880, by means of its alliance with the Atchison, Topeka and Santa Fe, and St. Louis and San Francisco Railroad Companies, it began work on the Western division, and pushed its road with

great rapidity from the Rio Grande westward through New Mexico and Arizona, and across the Colorado river, at The Needles, from which point it acquired by purchase the road of the Southern Pacific Company, to Mojave, in the State of California, a distance of 815 miles from Albuquerque. In the meantime, without being able to effect any change in the status of the land in the Indian Territory, it began work at Vinita, and pushed forward to Sapulpa, west of the Arkansas river. These operations were only accomplished by the most strenuous efforts on the part of the stockholders of the company, in the face of the greatest difficulties, and they represent everything that was in human power to accomplish within that period under the circumstances. By reason of the obstacles thrown in its way, as already stated, the failure of the Government to extinguish the Indian title to its grant, the establishment of new Indian reservations upon its line and including portions of its grant, the failure of the Government to survey and patent the land earned by construction, so as to enable the company to market them successfully, it was an absolute impossibility to finance the further construction of the road, and to fill up the intervening
427 gaps in the located line. Before the completion of its last-mentioned extensions hostile legislation began to be threatened by Congress, which had the effect of discouraging the prosecution of the work, and frightening away capital from investments in the securities of the company to such an extent that work was temporarily suspended, and then came the paralyzing blow in the shape of the act of July 6th, 1886, declaring the forfeiture of its land grant; since which time the company has not been able to resume work, and the road remains in an uncompleted condition.

Interrogatory 10. State whether or not the Government of the United States has extinguished the Indian title to the lands within the grant limits, under said act of Congress, as fixed by the definite location of the line of said railroad; and if you say it has not, then state to what particular portions of the lands such failure of the Government applies.

Answer. The Government of the United States has not extinguished the Indian title to any land whatever lying along the line of definite location of the Atlantic and Pacific railroad, but on the contrary, has settled many tribes of Indians upon land where no Indian title existed at the date of the grant, not only in the Indian Territory, but also in the Territories of New Mexico and Arizona.

Interrogatory 11. State whether or not from the date of definite location of the line of said road, pursuant to the act of Congress of July 27th, 1866, up to the 6th day of July, 1886, the Government of the United States has established or located upon any of the lands included within the grant limits of the said railroad, any Indians or Indian reservations. If so, please specify the dates and places thereof, and state particularly what quantity of land earned by construction within the grant or indemnity limits of said rail-
428 road, as fixed by the act of Congress, and the definite location of the line, was covered by each of such reservations.

Answer. Reservations, both Indian and military, were established

within the grant between July 27th, 1866, and July 6th, 1886, as follows:

1. Navajo Indian reservation in New Mexico:

	GRANT.	INDEMNITY.
	Acres.	*Acres.*
By treaty of June 1, 1868	223,360	92,800
By ex. order January 6, 1880	189,120	45,120
Total in New Mexico	412,480	137,920
In Arizona:		
By treaty of June 1, 1868	147,840	106,240
By ex. order January 6, 1880	98,080	91,520
By ex. order October 29, 1878		640
Total in Arizona	245,920	198,400
Total Navajo Indian reservation in New Mexico and Arizona	658,400	337,320
Total		995,750

2. Zuni Indian reservation in New Mexico:

In 1689 the government of Spain granted to the Zuni Indian tribe, 17,581.25 acres of land, as shown by the General Land Office report for 1880.

By executive order of March 16th, 1877, the Zuni Indian reservation was established and covered 244,224 acres, including the Spanish grant of 1689.

The reservation was still further increased by executive order of May 1st, 1883, by 52,480 acres, making in all 296,704 acres. The "Public Domain" of 1884, compiled under the direction of the Commissioner of the General Land Office, gives, on page 735, the
429 area of the reservation as 215,040 acres, being 81,664 acres less than that shown by the executive orders and map. Deducting from the total area of 296,704 acres, the area of the Spanish grant of 1689, 17,581 acres, leaves 278,123 acres of land set aside for the Zunis since the passage of the act of July 27th, 1866, and the filing of the map of definite location of the line of the railroad in New Mexico, March 12th, 1872. One-half of the last-mentioned area, 139.061 acres, inured to the company under its grant.

3. Moqui Indian reservation in Arizona:

Established by executive order of December 16th, 1882.

Grant lands included	524,480 acres.
Indemnity lands included	193,920 acres.
Total	718,400 acres.

4. Suppai Indian reservation in Arizona:

Established by executive orders of June 8th, and November 23d, 1880, and March 31st, 1882. Grant lands included, 19,200 acres.

5. Hualpai Indian reservation in Arizona:

Established by executive order of January 4th, 1883.

Grant lands included	345,600 acres.
Indemnity lands included	19,840 acres.
Total	365,440 acres.

6. Colorado River Indian reservation in Arizona:

Established by act of Congress March 3d, 1865; enlarged by executive orders of November 23d, 1873, November 16th, 1874, and May 15th, 1876. Indemnity lands included, 17,600 acres.

7. Camp Verde Indian reservation in Arizona:

Reserved for Apache Indians by Vincent Colyer, member of board of Indian commissioners, October 3d, 1871, in his letter to
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Brevet Major General C. Grover, commanding Camp Verde, Arizona; Vincent Colyer to Secretary of the Interior, November 7th, 1871; Secretary of the Interior to the President, November 7th, 1871; executive order November 9th, 1871—annulled by executive order of April 23d, 1875.

Grant lands included	213,520 acres.
Indemnity lands included	39,680 acres.
Total	253,200 acres.

Although the orders establishing the reservation have been annulled, the executive branch of the Government denies that the odd-numbered sections reverted to the company, though no reservation existed at the date of the grant.

Recapitulation of Areas of Indian Reservations.

	Grant.	*Indemnity.*	*Total.*
Navajo	658,400	337,320	995,720
Zuni	139,061	.....	139,061
Moqui	524,480	193,920	718,400
Suppai	19,200	.....	19,200
Hualpai	345,600	19,840	365,440
Colorado River	.....	17,600	17,600
Camp Verde (Apache)	213,520	39,680	253,200
	1,900,261	608,360	2,508,621

Military Reservations.

1. Fort Wingate, N. M.:

Established by executive order of February 18th, 1870, containing 64,000 acres. Enlarged by executive order of March 26th, 1881, by 19,200 acres, making 83,200 acres, one-half, 41,600 acres, inured to the company under its grant in place.

2. Camp Verde, Arizona:

Established by executive orders of March 30th, 1870, and August 17th, 1876. Indemnity lands included, 3,700 acres.

3. Camp Mohave, Arizona, and hay and wood reservation:

431 Established by executive order of March 30th, 1870. Grant lands included, 6,280 acres.

Recapitulation of Areas of Military Reservations.

	GRANT.	INDEMNITY.	TOTAL.
	Acres.	*Acres.*	*Acres.*
Fort Wingate	41,600	....	41,600
Camp Verde	.....	3,700	3,700
Camp Mojave	6,280	....	6,280
	47,880	3,700	51,580

Areas of Indian and Military Reservations in New Mexico and Arizona.

	Grant.	*Indemnity.*	*Total.*
Indian	1,900,261	608,360	2,508,621
Military	47,880	3,700	51,580
	1,948,141	612,060	2,560,201

The foregoing areas refer only to those portions of the reservations mentioned as fall within the limits of the grant.

Interrogatory 12. What was the effect of establishing such reservations and locating said Indians within the limits of the company's land grant, upon the construction of the road, and upon the obtaining of materials and raising of money for construction?

Answer. The effect of establishing Indian and military reservations in the limits of the company's grant, were found to be serious obstacles to the construction of the road. The establishing of Indian tribes west of the 98th meridian, on lands to which the Indian title was extinguished prior to the passage of the granting act, prevented the company from making its surveys for construction at a period when money could have been raised for the purpose of construction, if the surveys and estimates could have been made and the land made applicable. The surveying parties were in-

432 timidated and actually compelled to desist from their work.

While the Secretary of the Interior was examining the question as to our right to make surveys in a certain place, and at the end of the time that it took him to make such examination, winter had set in, and the surveying party had consumed its supplies, and many had become sick by reason of exposure and idleness, and the party had to be broken up and withdrawn. This cost the company a large expenditure of money—I cannot say how much—besides the loss of the opportunity to raise the money to go on with the work of construction.

On the Western division the expense incident to the delay in consequence of the Fort Wingate military reservation, was a great hindrance to the company. That reservation had been located long after the definite location of the road, and from time to time extended at the will of the commanding officer at that post. It was, and is a fact, that the timber at that place was the nearest of any to the road between Albuquerque and Flagstaff, which two points are more than 300 miles apart.

The general effect of the establishment of Indian reservations was hindering and discouraging from almost every standpoint; tie-cutters were in fear at all times of the Indians, though we were not cutting upon the reservations, yet the Indians claimed to possess the whole country, and objected to almost everything that the company was doing, and the greatest care and circumspection as to the conduct of the men had to be exercised at all times to prevent an Indian outbreak; and, in addition, the propensity of the Indians for stealing animals and other movable property, was so great as to keep everybody in connection with the construction of the road in constant dread, and so materially increased the price of all work that had to be done opposite, or along the points nearest to these Indian reservations.

433 . The establishment, or rather the settlement of Indian tribes on the lands west of the 98th meridian, and the failure on the part of the Government to extinguish the Indian title between the 98th meridian and the eastern boundary of the Indian Territory, finally proved an effectual barrier against the success of the company in raising money upon its grant in the Indian Territory, where on account of the value of the lands there would have been no difficulty, had the Government kept faith with the company, or in other words, had it done the things that it agreed to do by the terms of the granting act.

Interrogatory 13. State what, if any, impedi-ents were from time to time placed in the way of surve- or construction of said road by the action of the War or Interior Departments of the Government; and if there was any such interference, state what was the effect thereof upon the operations of the company? Give date and particulars.

Answer. I have stated in reply to interrogatory twelve, all that I could state under this interrogatory without repetition.

Interrogatory 14. State whether or not the Government has surveyed the lands falling within the limits of said grant, pursuant to the terms of the act of July 27th, 1866.

Answer. No, the Government has not surveyed the lands falling within the limits of said grant, pursuant to the act of July 27th, 1866.

Interrogatory 15. If you say that the Government has not surveyed said lands, state fully and particularly wherein it has failed to do so.

Answer. The Government has not surveyed the land continuously along any considerable portion of the line, and had not at the date of construction, surveyed any considerable quantity of it.

It had surveyed blocks of townships at various points along
434 the line, leaving a large number of townships unsurveyed through which the road passes. There were only two townships surveyed in the county of Mohave, in the Territory of Arizona, before the road was built and completed to The Needles, in California, and but very little has been surveyed in that county since. I shall be able to more particularly answer this question under the next succeeding interrogatory, number 16.

Interrogatory 16. State what quantity of earned land within the limits of the grant under said act of Congress, and opposite to portions of the road constructed and accepted by the Government, had not been surveyed up to the date of July 6th, 1886, and what quantity surveyed and not patented?

Answer. There were, approximately, 560 miles of completed railroad and telegraph line on the 6th day of July, 1886, from the junction of the Atlantic and Pacific railroad with the Atchison, Topeka and Santa Fe railroad, in New Mexico, through western New Mexico and Arizona, to the west bank of the Colorado river, of which 550 miles had been accepted by the President of the United States.

The grant along the said 560 miles covers 14,336,000 acres of lands within the grant in place, or forty-miles limits, and 3,584,000 acres of lands within the indemnity, or fifty-miles limits, including all lands covered by private land grants existing at the date of the grant, and of reservations established since that date.

Of these areas, 4,955,740 acres within the grant in place, or forty-miles limits, and 911,050 acres within the indemnity, or fifty-miles limits had been surveyed, and 5,356,670 acres within the grant in place, or forty-miles limits, and 1,390,190 acres within the indemnity, or fifty-miles limits, were unsurveyed on July 6th, 1886.

The figures as to surveyed and unsurveyed lands relate only to
435 lands outside of the private land grants and Indian and military reservations, and are approximately correct as shown by the maps compiled for this company in the General Land Office.

Of the surveyed lands but one patent had been issued up to July 6th, 1886, for 23,037.36 acres in New Mexico, although applications for patents covering a large area of lands in Arizona had been filed as follows:

April 16th, 1885	133,502.16
September 7th, 1885	99,712.66
February 18th, 1886	274,315.89
Total	507,530.71

This leaves 4,932,700 acres of surveyed lands in the grant in place unpatented at said date, of which 507,530.71 acres had been applied for.

Interrogatory 17. What efforts were made by the Atlantic and Pacific Railroad Company to procure a survey of its earned lands by the Government, and what was the result of such efforts?

Answer. The Atlantic and Pacific Railroad Company, by its land commissioner, and its general solicitor, and its resident attorneys in Washington, have constantly urged and solicited the Commissioners of the General Land Office, and of the Secretaries of the Interior, to recommend to Congress that it appropriate moneys sufficient to survey the lands granted to the Atlantic and Pacific Company, so that it might make them available for raising money to meet its various obligations.

The sixth section of the act of July 27th, 1866, requiring that the land should be surveyed as fast as needed for construction, was always presented as the leading or controlling reason why the Secretary of the Interior should recommend an appropriation of moneys by Congress for this purpose. Instead of complying with this reasonable request on the part of the company, one of the Com-
436 missioners of the General Land Office took the position that he would not ask for even the ordinary appropriation of moneys for the surveys in the Territories where the lands were situated.

The company at one time offered to advance money for the survey of certain portions of the land, and allow the sum to remain to their credit, to pay for surveys and patenting of lands from time to time, as the Government might issue the patents. It was held by the Interior Department that there was no law permitting surveys to be made in that manner.

The general result of all efforts to procure surveys, or to procure patents for such lands as had been surveyed, have been fruitless and without effect, except in a very small degree. Many frivolous objections have been raised by requiring unusual proofs to be made of the non-mineral character of the land, such as had never been imposed until within the last five or six years, and which were quite impracticable on account of the cost, and in many cases such expense would have amounted to more than the value of the land, as I verily believe.

Interrogatory 18. If you have not already done so in answer to previous questions, please state in full all the facts within your knowledge in relation to the matter of survey and patenting of lands earned by the railroad company by construction of its road and acceptance thereof, pursuant to the act of July 27th, 1866?

Answer. I have previously, in this deposition, answered this interrogatory as fully as I can, and any further answer would be a repetition of what I have before stated.

Interrogatory 19. What was the effect of the failure of the Government to survey or patent the lands opposite constructed portions of the road as fast as earned by the railroad company under the terms of the act, upon the raising of money by the railroad company for further construction.

437 Answer. The failure on the part of the Government to survey and patent the lands operated at all times as a hindrance to the raising of money by the sale of lands, and many Government agents sent out by the General Government, under instructions to examine fraudulent land entries and trespasses upon the

public lands, in their overzeal, or from an innate desire to injure, asserted often, and in many localities, that the railroad company had no grant that would be recognized by the Government, and advised settlers or speculative squatters to go upon the lands, and especially upon the valuable springs of water, and hold them, and the neglect or refusal of the Government to survey the lands and issue patents, gave color to the statements made by its agents, that it did not recognize the company as having a grant of lands along its road. Although I do not pretend to say, nor do I believe that such statements as were made by the agents, were any part of the instructions given them by either the Commissioners of the General Land Office, or the Secretary of the Interior, but, nevertheless the effect was disastrous, and the company is still feeling the injustice that was done it by these agents, as the people whom they induced to take up some of the most valuable portions of the land, are reluctant to give up rights which they believe, or pretend to believe, that they had acquired by settlement.

If the Government had surveyed and patented the lands all vexatious litigation about titles would have been avoided, and the railroad company could, and would have been able to induce settlers to purchase and settle upon its land. Even at this date the ignorant and vicious are settling upon some of the land containing springs of water, and denying that this company has any title, giving as the only and sole reason for their action, that this company has no patents for the land.

438 After having the sole management of this grant for nearly twelve years, in which time I have fully acquainted myself with the most important facts affecting the value of the grant to the company, I feel warranted in saying, that the survey and patenting of the land as provided for in the act of July 27th, 1866, would, before this time have doubled its value to the company to which it was granted. I make this statement having in view the fact that such survey and patenting according to the law, would have prevented the creation of the Indian reservations, thereby keeping them away from the road, which fact would have caused an influx of settlers who would have recognized the company's title to the land, and purchased from it, and as a consequence made business for the road. The extinguishment of the Indian titles and the survey and patenting of the land would, even at this late date, more than double the value of the grant to this company. In this answer I am referring to the whole grant as contemplated and made by the act of July 27th, 1866, along all the completed road, including that in the Indian Territory.

Interrogatory 20. If there is any other fact material to the issue of this case, and of benefit to either party, please state the same.

Answer. I know of no other material fact that would benefit either party in this case, but desire to make a qualifying and explanatory statement with reference to the answers I have given.

The original records of the organization of the Atlantic and Pacific Railroad Company are kept in the city of Boston, in possession of the secretary of the company; also the records of all meetings of

the directors. The records of the engineering department are, I believe, kept in Albuquerque, New Mexico, and therefore I
439 have not had access to the records to verify exactly some parts of my answers, such as relates to the exact dimensions and cost of some of the bridges; also with reference to the exact mileage given, both as to the constructed and unconstructed portions of the road.

The mileage of the unconstructed portions of the road, and of the whole length of the line from Springfield, Missouri, depends on computations from such Government surveys as have been made, and upon figures shown on maps of definite location, which latter I have not present access to.

The areas of land, surveyed and unsurveyed, I computed from maps published by the Interior Department of the Government. Slight errors may exist in my calculations, and doubtless do so exist, as measurements on such maps are rarely exactly correct, and such inaccuracies as do exist must of necessity effect, in a slight degree, computations based on such measurements.

All statements of opinion and belief are based on my knowledge of the facts.

(Signed) J. A. WILLIAMSON.

I, George B. Howard, notary public in and for the county of Cook, and State of Illinois, do hereby certify that I did, on the nineteenth day of November, 1892, in the Monadnock building in the city of Chicago, county of Cook, and State of Illinois, propound to James A. Williamson, a part of the interrogatories in the foregoing deposition, and took his answers thereto, and then adjourned the taking of his further deposition till November the twenty-first, 1892, when I propounded the remaining interrogatories and took his answers thereto, as they appear in the foregoing deposition, and I further certify that the witness was duly sworn as to the truth of his deposition, and that he subscribed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, this twenty-first day of November, A. D. 1892.

(Signed) GEORGE B. HOWARD,
Notary Public, Cook County, Illinois.

440 Mr. SPRINGER: I here offer in evidence the deposition of H. C. Pickles, receiver of the United States land office, showing location of the tract of land mentioned in the declaration, within the limits of the Atlantic and Pacific grant, as defined by the plats of the definite location, and the withdrawal from entry and sale based thereon, under executive order of May 17th, 1872, and that it was at the date of filing such plat of land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, which is marked Exhibit No. 19, and is as follows:

EXHIBIT No. 19.

Interrogatory 1. What is your name, age, occupation and place of residence?

Answer. Henry C. Pickles; age, thirty-two years; residence, Clayton, New Mexico.

Interrogatory 2. If you say that you are a register of the United States land office in and for the Colfax district in New Mexico, please state whether the following-described tract of land is within your district, to wit: The north one-half of the northwest one-quarter and the northwest one-quarter of the northeast one-quarter of section five, township seven north, range twenty-six east; and the southwest one-quarter of the southeast one-quarter of section thirty-two, township eight north, range twenty-six east of New Mexico meridian, in New Mexico Territory, containing one hundred and sixty acres. And whether you have in your office the tract book and township plat of survey, containing the said tract?

Answer. I am not register of the United States land office in and for the Colfax district of New Mexico, but I am the receiver of said office, and the north one-half of the northwest one-
441 quarter, the northwest one-quarter of the northeast one-quarter of section five, township seven, north of range twenty-six east, and the southwest one-quarter of the southeast one-quarter of section thirty-two, township eight north of range twenty-six east, is within said district, and the tract book and township plat of survey containing said tract is part of the records of this office. The above-named land is described in said records as lots two, three, and four, of section five, township seven, north of range twenty-six east, and the southwest one-quarter of the southeast one-quarter of section thirty-two, township eight, north of range twenty-six east, containing one hundred and sixty acres.

Interrogatory 3. If you have such tract book and copy of township plat, please furnish, to be attached to your deposition, a copy of said township plat, and also a copy of the page of the tract book showing the said tract of land.

Answer. Copy of said township plat and copy of the page of the tract book showing the said tract of land, are hereto attached, marked Exhibit A.

The following is a copy of the page of the tract book showing the said tract of land:

UNITED STATES LAND OFFICE, CLAYTON, N. M.

The following is a copy of page 74 of Tract Book No. 2, of the records of this office:

North one-half northwest one-quarter, northwest one-quarter northeast one-quarter, section five, township seven north, range twenty-six east. See section thirty-two, township eight north, range thirty-two east.

The following is a copy of page ninety-five of Tract Book No. 2, of the records of this office:

East one-half northeast one-quarter, section thirty-two, township eight north, range thirty-two east. See section thirty-three.

442 Donation, southeast one-quarter, section thirty-two, township eight north, range thirty-two east. Jose A. Ulibarri, March 6th, 1882. Cancelled "D," May 22d, 1883.

Pre. D. S. 2,541, north one-half northwest one-quarter, northwest one-quarter northeast one-quarter, section five, township seven north. Southwest one-quarter southeast one-quarter, section thirty-two, township eight north, range twenty-six east. Albert W. Bray filed January 9th, 1888. Cash entry No. 113, filed certificate April 3d, 1891.

Pre. D. S. 1,558, southeast one-quarter, section thirty-two, township eight north, range twenty-six east. William S. Rathburn filed February 2d, 1885.

I hereby certify that the above is a true copy of pages 74 and 95, Tract Book No. 2.

December 10th, 1892.

HENRY C. PICKLES, *Receiver.*

(By agreement township plat to be transmitted.)

Interrogatory 4. State whether or not said tract of land is within the forty-mile limits of the grant to the Atlantic and Pacific Railroad Company, as the same was withdrawn from entry by executive order or letter of the Secretary of the Interior, of date May 8th, 1872.

Answer. It is.

Interrogatory 5. State whether or not, as appears from the records of your office, said tract of land was at the date, March 12th, 1872, public land of the United States, not mineral.

Answer. The records of the United States land office for the Colfax district show said tract of land was non-mineral public land at that date.

Interrogatory 6. State whether at said last-mentioned date, as appears by the records of your office, the said tract of land was land to which the United States had full title, and whether the same was then reserved, sold, granted, or otherwise appropriated by the United States, and whether the same was then free from pre-emption or other rights and claims.

443 Answer. The records of the United States land office for the Colfax district, shows that the plat of township seven, north of range twenty-six east, and the plat of township eight, north of range twenty-six east, were respectively examined and approved by Surveyor General Atkinson, July 25th, 1881, and filed in the United States land office at Santa Fé, on October 6th, 1881, that the north one-half of the northwest one-quarter, the northwest one-quarter of the northeast one-quarter, of section five, township seven, north of range twenty-six east, and the southwest one-quarter of the southeast one-quarter, of section thirty-two, township eight, north of range 26 east, is identical on said plats with lots two, three, and four, of section five, township seven, north of range twenty-six east; and the southwest quarter of the southeast quarter, of section thirty-two,

township eight, north of range twenty-six east, containing one hundred and sixty acres, was land to which the United States had full title, and it was not reserved, sold, granted, or otherwise appropriated, and it was free from pre-emption and other recorded claims or rights on March 12th, 1872. The only reservation of this tract which the records of this office show was the withdrawal of it by the order of May 8th, 1872, from entry or sale as part of the Atlantic and Pacific grant, from which withdrawal it was subsequently restored to the public domain and became subject to entry.

Interrogatory 7. State whether or not, as appears by the records of your office, the said tract has, since the 12th day of May, 1872, been entered by any person under the pre-emption or homestead laws of the United States, and any certificate of entry or final receipt given therefor, and if so, by whom, at what date, and what is the present status of said tract as shown by the records. Please
444 give dates of entry, certificate or receipt, final proof, or any other steps taken in connection with any entry of said land.

Answer. It appears from the records of the United States land office of Colfax district, that the southwest one-quarter of the southeast one-quarter, of section thirty-two, township eight, north of range twenty-six east, is embraced in donation claim No. 330, of Jose A. Ulibarri, for the southeast one-quarter of said section, township and range, which entry was cancelled by the department by letter "D," May 22d, 1883. That said southwest one-quarter of the southeast one-quarter of section thirty-two, township eight north of range twenty-six east, is embraced in pre-emption declaratory statement No. 1558, filed February 2d, 1885, for the southeast one-quarter of said section, township and range, by Wm. S. Rathburn, and that on January 9th, 1888, Albert W. Bray filed at the Santa Fé land office, pre-emption declaratory statement No. 2541, for the north one-half of the northwest one-quarter, the northwest one-quarter of the northeast one-quarter, of section five, township seven, north of range twenty-six east, and the southwest one-quarter of the southeast one-quarter of section thirty-two, of township eight, north of range twenty-six east; that said Bray made final proof and payment for said land on March 10th, 1891, before the clerk of the probate court of San Miguel county, New Mexico, and that final certificate and receipt No. 113 was issued April 3d, 1891, to said Bray; that a patent to said entry in the name of Albert W. Bray was issued December 10th, 1891, and said patent was delivered to Robert Mingus by mail, to Puerto de Luna, New Mexico, on March 17th, 1892.

HENRY C. PICKLES.

TERRITORY OF NEW MEXICO, } ss:
County of Colfax, }

On this tenth day of December, A. D. one thousand eight
445 hundred and ninety-two, before me, a duly commissioned notary public in and for the county and Territory aforesaid, personally came Henry C. Pickles, to me well known, and acknowledged that after carefully perusing the foregoing interrogatories,

and answers which he had made thereto, under oath, that he had subscribed his name to the above in my presence.

[SEAL.] Witness my hand and official seal the day and year first above written, at Clayton, Colfax county, New Mexico.

GEORGE A. BUSHNELL,
Notary Public.

(Commission expires Oct. 21, 1893.)

(Here follows plat marked p. 445*a*.)

Mr. SPRINGER: I have a witness to prove entry and possession by defendant of the land described in the declaration, and withholding the same from plaintiff at the time alleged therein, and at the commencement of the suit, but who is temporarily detained. I could prove these facts by my own testimony from admissions made to me by the defendant, but I dislike to be a witness. Perhaps to save time, counsel will waive strict proof of this merely formal matter, as the fact is well known and not disputed.

Mr. FORT: We will admit the entry and possession by defendant upon the land as stated by counsel for plaintiff, but of course deny that such possession was wrongful.

Plaintiff rests.

DEFENDANT'S CASE.

Mr. FORT: We offer in evidence a United States patent, covering the land in controversy, issued to Albert W. Bray, December 10th, 1891, which is marked Exhibit No. 21, and is as follows:

446 Objected to by plaintiff's counsel on the ground that the patent was issued without authority of law, being for land previously granted by the United States to plaintiff, and reserved from entry and sale, and is therefore void on its face. Objection overruled. Exception taken.

EXHIBIT No. 21.

Certificate No. 113.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, Albert W. Bray, of San Miguel county, New Mexico Territory, has deposited in the General Land Office of the United States, a certificate of the register of the land office at Folsom, New Mexico Territory, whereby it appears that full payment has been made by the said Albert W. Bray, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the north half of the northwest quarter, and the northwest quarter of the northeast quarter, of section five, in township seven, north of range twenty-six east, and the southwest quarter of the southeast quarter, of section thirty-two, in township

eight, north of range twenty-six, east of New Mexico meridian, in New Mexico Territory, containing one hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Albert W. Bray,

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Albert W. Bray, and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto
447 the said Albert W. Bray, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the tenth day of December, in the year of our Lord one thousand
[SEAL.] eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

By the President: BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*
I. R. CONWELL,
Recorder of the General Land Office ad Interim.

Mr. FORT: We offer in evidence warranty deeds from Albert W. Bray to Ezra E. Griffith, and from Ezra E. Griffith to Robert Mingus, conveying the same property, marked Exhibits Nos. 22*a* and 22*b*, which are as follows:

Objected to by plaintiff's counsel because founded on a void patent and therefore passing no title.

Objection overruled.

Exception taken.

EXHIBIT No. 22 A.

This indenture, made this fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-two, between Albert W. Bray, of the county of San Miguel, Territory of
448 New Mexico, of the first part, and Ezra E. Griffith, of Brooklyn, New York, of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of four hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents does grant, bargain, sell, remise, convey, release and confirm unto the said party of the second part, his heirs and assigns forever, all the following-described lot or parcel of land and real estate, situate, lying and being in the county of San Miguel, and Territory of New Mexico, to wit: North half northwest quarter, and northwest quarter of the northeast quarter, section number five, township number seven, north of range twenty-six east, and the southwest quarter of the southeast quarter, of section number thirty-two, of township number eight, north of range twenty-six east, and containing one hundred and sixty acres of land.

Together with all and singular, the lands, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtena-ces:

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said party of the first part, for his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, of a good, sure, perfect and indefeasible estate of inheritance, in law, in fee-simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumberances of what kind and nature soever, and the above-
449 bargained premises, in the quiet and peaceable possession of the party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim, the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

ALBERT W. BRAY. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of San Miguel, } *ss:*

Be it remembered, that on this 15th day of March, A. D. one thousand eight hundred and ninety-two before me, the undersigned, a clerk of the probate court, in and for the said county, in the Territory aforesaid, personally came Albert W. Bray, unmarried, per-

sonally known to me to be the person whose name is subscribed to the foregoing deed, and as party thereto he acknowledged that he signed, sealed and executed the said instrument of writing as his free and voluntary act, for the uses, purposes and consideration therein set forth.

Witness my hand and seal the day and year last above written.

[SEAL.] R. F. HARDY,
Clerk of the Probate Court.

(My commission expires on Dec. 31, 1892.)

(Endorsement:) Warranty deed, Albert W. Bray to Ezra E. Griffith.

TERRITORY OF NEW MEXICO, } ss:
County of San Miguel, }

I hereby certify that this instrument was filed for record on the 15th day of March, A. D. 1892, at 4 o'clock p. m., and was duly recorded in Book 37, of Records of Deeds and Conveyances, page 347, on this 15th day of March, A. D. 1892.

Witness my hand and seal of office.

[SEAL.] R. F. HARDY,
Probate Clerk and ex Officio Recorder.

450 EXHIBIT No. 22 B.

This indenture, made this — day of —— in the year of our Lord one thousand eight hundred and ninety-two, between Ezra E. Griffith, of Brooklyn, New York, of the first part, and Robert Mingus, of the county of San Miguel, Territory of New Mexico, of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of four hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, conveyed, released and confirmed, and by these presents does grant, bargain, sell, remise, convey, release and confirm unto the said party of the second part, his heirs and assigns forever, all the following-described lot or parcel of land and real estate, situate, lying and being in the county of San Miguel, and Territory of New Mexico, to wit: North half northwest quarter, and northwest quarter of the northeast quarter, section number five, township number seven, north of range twenty-six east, and the southwest quarter of the southeast quarter, of section number thirty-two, of township number eight, north of range twenty-six east, and containing one hundred and sixty acres of land.

Together with all and singular, the lands, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party

of the first part, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenances:

To have and to hold the said premises, above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said party of the first part, for his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, of
451 a good, sure, perfect and indefeasible estate of inheritance, in law, in fee-simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above-bargained premises, in the quiet and peaceable possession of the party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming, or to claim, the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EZRA E. GRIFFITH. [SEAL.]

Signed, sealed and delivered in the presence of—
ANNIE E. MINGUS.

STATE OF NEW YORK, }
County of New York, } ss:

Be it remembered that on this 24th day of March, A. D. one thousand eight hundred and ninety-two, before me, the undersigned, a notary public in and for the said county, in the State aforesaid, personally came Ezra E. Griffith, widower, personally known to me to be the person whose name is subscribed to the foregoing deed, and as party thereto he acknowledged that he signed, sealed and executed the said instrument of writing as his free and voluntary act, for the uses, purposes and consideration therein set forth.

Witness my hand and seal the day and year last above written.

[SEAL.] SIGOURNEY VAN ZANETT,
Notary Public, New York County.

(My commission expires March 30th, 1893.)

(Endorsement:) Warranty deed. Ezra E. Griffith to Robert Mingus.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } ss:

I hereby certify that this instrument was filed for record
452 on the 28th day of March, A. D. 1892, at 4 o'clock p. m., and

was duly recorded in Book 37 of Records of Deeds and Conveyances, page 352, on the 28th day of March, A. D. 1892.

Witness my hand and seal of office.

[SEAL.] R. F. HARDY,
Probate Clerk and ex Officio Recorder.

Mr. FORT: We offer in evidence an act of Congress of the United States, approved July 6th, 1886, forfeiting that part of the grant to the Atlantic and Pacific Railroad Company which had not at that date been earned by construction of the road. There is no pretense that the road has been even yet built opposite this land. It is marked Exhibit No. 23, and is as follows:

Objected to by counsel for plaintiff, because the said act is in contravention of the rights of the Atlantic and Pacific Company, as fixed by the acts of 1866 and 1871; no power of forfeiting the grant without judicial inquiry having been reserved by the United States in the granting act; said act is therefore an attempt to deprive the plaintiff of its property without due process of law, and is unconstitutional and void.

Objection overruled.

Exception taken.

EXHIBIT No. 23.

An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so
453 forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, heretofore granted to the Atlantic and Pacific Railroad Company, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby declared forfeited and restored to the public domain.

Approved July 6th, 1886.

Mr. FORT: We offer in evidence report of the committee of House of Representatives, accompanying the bill to forfeit the Atlantic and Pacific grant, passed July 6th, 1886, marked Exhibit No. 24, and which is as follows:

Objected to by plaintiff's counsel as irrelevant.

Objection overruled.

Exception reserved.

EXHIBIT No. 24.

Forty-ninth Congress, 1st session, House of Representatives. Report No. 193. To forfeit lands granted Atlantic and Pacific Railroad Company.

February 3, 1886.—Referred to the House calendar and ordered to be printed.

Mr. Cobb, from the Committee on Public Lands, submitted the following report, to accompany bill H. R. 453:

454 The Committee on the Public Lands, to whom was referred the bill (H. R. 453) to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and restore the same to settlement, and for other purposes, have had the same under consideration, and make the following report:

Strike out the words "and lands for station," in lines 3 and 4 of the bill; also strike out all after the word "be," in line 21, section 1, and insert in lieu thereof "$1.25 per acre," and add the following: "Provided, that nothing in this act shall be held to impair any right that the United States may have in or to the lands not forfeited by this act;" also strike out all of section 2.

And, as thus amended, your committee recommend the passage of the bill, and assign the following reasons therefor:

The grant made to the Atlantic and Pacific Railroad Company is, according to the estimate made by the company, the largest land grant ever made to any corporation in this country, the estimated number of acres being 49,244,803—an empire in extent.

The act making this great grant was approved July 27th, 1866. (14 Stat. at Large, 292.) By this act the Atlantic and Pacific Railroad Company was authorized and empowered to lay out and construct a continuous railroad and telegraph line, beginning at the town of Springfield, in the State of Missouri; thence to the western boundary line of said State, and thence, by the most eligible railroad route as should be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio, to the headwaters of the Colorado Chiquita; thence, along the thirty-fifth parallel, to the Colorado river, and thence to the Pacific ocean, with a branch diverging at a point where the main line strikes the Canadian river, running eastwardly to a point on the western boundary line of the State of Arkansas, at the town of Van Buren; thus the

main line passing through the Indian Territory, Texas, New
455 Mexico, Arizona, and California, a distance of more than 2,000 miles.

The second section of said act grants to said company the right of way over the public lands to the extent of 100 feet on each side of said road, and an additional amount of land for deposits, &c.

The third section provides "that there be and hereby is granted" to said company, for the purpose of aiding in the construction of its road and telegraph line, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State. And in case any lands within this limit were disposed of by the Government, the company was to have the right to select other lands in lieu thereof in alternate odd-numbered sections, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

The fourth section of said act provides that whenever said company shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that the same has been completed in a good, substantial, and workmanlike manner the commissioners shall so report, under oath, to the President of the United States, and patents of lands shall be issued to said railroad company confirming to said company the right and title to said lands situate opposite to and coterminous with said completed section of said road. And the same shall be done as often as any 25 consecutive miles are completed.

The sixth section provides that the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and that the odd sections of land granted shall not
456 be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by said act.

The eighth and ninth sections set forth the principal conditions on which said grant is made.

The twelfth section provides that the company shall accept the terms and conditions of the grant within two years after the passage of the act, by depositing in the office of the Secretary of the Interior such acceptance in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained.

These are the only sections of the act which need be referred to at this time for the purposes of this report. Congress passed an act April 20th, 1870, to enable the company to mortgage its road, which will be considered further on.

The material facts are as follows:

The company accepted the grant by depositing in the Interior Department its acceptance in writing on the 27th day of November, 1866.

By the sixth section of said act, as has already been observed, it is provided that the company shall fix the general route of its road, and when this was done the President of the United States was to cause the lands to be withdrawn, &c.

A map of the general route of said road was filed in the Interior Department December 17th, 1866, from Springfield, in the State of Missouri, to the west line of said State, and the public lands embraced within the limits of said grant were withdrawn to the extent or coterminous with this part of the located route.

It is a fact that should be observed, that no further map of the general route was filed until December 2d, 1871, more than five years after the passage of the granting act. And the first map of definite location was not filed in the Interior Department until December 10th, 1870, and that extended only from Springfield to Neosho, in the State of Missouri, and was filed more than four years after the date of the granting act, and more than two years after the construction of said road was to have been commenced, and after two years of the time had elapsed during which it was re-
457 quired by the granting act to complete not less than 50 miles of its road each year. It is claimed by the company that the construction of the road was commenced July 4th, 1868. But the affidavits of the chief engineer, on file in the Interior Department, show that the first 25 miles of the road *was* not completed until September 27th, 1870, being that portion of the road running west from Springfield, in the State of Missouri. And only 125 miles of the road *was* completed within the time fixed for the completion of the whole of the main line, leaving unfinished more than 2,000 miles; thus showing that if the construction of the road was commenced on July 4th, 1868, it was only done for the purpose of a technical compliance with that condition, as no substantial part of the road, as we have already shown, was completed until about September, 1870, thereby proving that the company was guilty at the very beginning of two flagrant violations of the conditions of its contract with the Government, in not completing at least 50 miles each two years after the date when the work was to commence, and not having completed the main line within the time fixed. The 125 miles was not completed until October 14th, 1871.

In November, 1870, this company purchased from the Saint Louis and San Francisco Railway Company the latter's railroad running from a point near Saint Louis to Springfield, in the State of Missouri. This was done under the pretext of securing an eastern outlet. The price agreed to be paid was $10,000,000, which was secured by mortgage on the property so purchased, and that part of the grantee's road together with the land grant lying in the State of Missouri. A year after this purchase the company became so much embarrassed financially that it stopped the further construction of its road and afterwards made default in the payment of interest on its said mortgage indebtedness. And the said mortgage was fore-

closed, and afterwards, on September 14th, 1876, the entire mortgaged property was sold to William F. Buckley, and by him conveyed, November 2d, 1876, to the Saint Louis and San Francisco Railway Company. Thus this latter company again became the owner of the property it had sold, and also that part of the
458 road and land grant belonging to the Atlantic and Pacific Company lying in the State of Missouri, leaving the latter company the owner of but 34 miles of completed road at the date of said sale. And this is the only portion of said road the company built west of the western line of the State of Missouri. And this is operated and controlled by the Saint Louis and San Francisco Railway Company. This latter company built during the last year 65 miles of road over the line of the Atlantic and Pacific west from Vinita, and is now operating the same.

As has been stated, the Atlantic and Pacific Company stopped the construction of its road in the year 1871, and no more of its road was completed until November, 1882, more than eleven years after it had suspended work, and more than four years after the time when the main line should have been completed by the terms of the granting act. And said company was utterly powerless to complete any further portion of its road when the Atchison, Topeka and Santa Fe and the Saint Louis and San Francisco Railroad Companies, for the purpose of being able to completely control the Atlantic and Pacific Company and its imperial land grant, and to ultimately become the owner of all its property, entered into a contract with the latter company for the completion of that part of said road from Albuquerque, New Mexico, to the Pacific ocean, known and designated as the Western division. This tripartite agreement was entered into January 31, 1880, and provided for the immediate completion of the said Western division.

To provide the money necessary for this construction, early in 1880, a first mortgage, to secure an issue of bonds not exceeding $25,000 per mile, was placed upon the entire railroad, franchise, and land grant of the Western division; and an income mortgage to secure an issue of income bonds, not exceeding $18,750 per mile upon this division, was also executed. Should the net earnings of the Western division prove insufficient to meet the interest upon those first-mortgage bonds, the Saint Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have guaranteed the same to the extent of 25 per
459 cent. of their gross earnings upon all busines- interchanged by them respectively with the said Western division.

In April, 1880, $10,000,000 of the first-mortgage bonds and $7,500,000 of the income bonds of this division were sold by subscription at par for the first-mortgage bonds to parties holding rights under the agreement. A second subscription of $15,000,000 firsts and $11,250,000 incomes of the Western division was offered the same parties by circular dated January 20th, 1882, and promptly subscribed in full; but before allotment all subscriptions were reduced by the board of directors February 28th, 1882, to 40 per cent. of the original amount—that is, to $6,000,000 firsts and $4,500,000

incomes, in accordance with the right reserved by the terms of the subscription.

Should the net proceeds of these subscriptions prove to be insufficient to complete the road, and pay the interest upon the first-mortgage bonds during construction, arrangements have been made with the Atchison, Topeka and Santa Fe Railroad Company and the Saint Louis and San Francisco Railway Company, which owns nearly all of the capital stock of this company, to advance any deficit, share and share alike, in the form of a loan, to be repaid hereafter.

And a first mortgage was also executed on the 1st day of March, 1882, on that portion of the road between the west line of the State of Missouri, near Seneca, to the town of Albuquerque, on the Rio Grande river, in the Territory of New Mexico, called the Central division, to secure the payment of bonds to the amount of $25,000 per mile for that part of the road.

These bonds were all taken, and are now owned by parties interested in the Atchison, Topeka and Santa Fe and the Saint Louis and San Francisco Companies, and the capital stock is now owned by these two companies; and the Atlantic and Pacific road, and all the property, rights, and franchises of the company, are virtually owned and controlled by these two corporations. They hold the mortgage interests complete, all of the road which is completed, and operate it after it is so completed. We believe that the tripartite agreement above referred to was entered into with a full un-
460 derstanding by all the parties that the Atlantic and Pacific was to maintain a nominal existence merely so as to enable these two corporations to secure the benefit of the land grant to the extent they desire under the act passed by Congress April 21st, 1871, to enable the Atlantic and Pacific Company to mortgage its road. They caused the mortgages named to be executed and the bonds to be issued, for the individuals composing these two companies owned the capital stock of the Atlantic and Pacific Company, thus giving them complete control of the latter company. They bought the bonds so issued, and now own them, and these corporations guaranteed their payment. They are, therefore, both debtor and creditor in this transaction. And they are now only completing such parts of said road as suits their selfish desires, in securing such parts of the land grant as may be cotermin-us therewith at the date of the declaration of forfeiture by the Government. Since entering into this tripartite agreement they have completed 559 miles of the Western division, extending west from Isleta Junction, on the Atchison, Topeka and Santa Fe railroad, to the Colorado river, near The Needles. At this latter point connection is formed with the Southern Pacific railroad, and running arrangements have been entered into with the latter road, extending to the city of San Francisco.

Whether the road will ever be completed west of its present terminus we do not know. But we do know that the lands have been withdrawn for more than fourteen years from homestead, preemption and entry the whole length of the road, and even beyond

what was contemplated by the granting act. The act required the company to construct its road on the most practicable and eligible route along the thirty-fifth parallel of north latitude to the Pacific ocean. This fixed the western terminus of the road, as we believe, at or near the point where the thirty-fifth parallel intersects the Pacific ocean. But instead of filing its map of definite location, in accord with this, when it crossed the east line of the State of California, it left the thirty-fifth parallel and passed up the Pacific coast,
and terminated the location near the thirty-eighth parallel
461 of north latitude, at the city of San Francisco; and strange as it may seem to some, the assistant Attorney General of the United States, W. H. Smith, sustained the right of the company to do so in a written opinion delivered March 16th, 1874, which was confirmed by the then Secretary of the Interior, C. Delano. Secretary Cox, a former Secretary, denied the company this right in a written opinion to the Commissioner of the General Land Office, delivered on November 11th, 1869. He said:

I cannot recognize the claim of the Atlantic and Pacific Railroad Company to a reservation of lands upon the route in question. The act already cited (July 27th, 1866), upon which they rely, does not, as I construe it, make them a grant of lands from the point at which the road shall strike the Colorado river to San Francisco.

We concur in the opinion of Secretary Cox. He is a gentleman of high legal attainments, and was an honest and faithful officer. But his opinions was overruled, as we have shown, and a vast area of public land was added to this already magnificent grant. The amount of land withdrawn in the State of California on account of this grant amounts to 6,855,040 acres, embracing some of the most valuable lands in the State.

And a summary of these facts shows:

(1) That the Atlantic and Pacific Company never completed but 34 miles of the road which it now claims to own.

(2) That the time when the main line should have been completed (July 4th, 1878), there was uncompleted 2,267 miles of that line.

(3) That said company at no time since its creation has been, and is now, able to complete the road.

(4) That the stockholders of the Atchison, Topeka and Santa Fe and the Saint Louis and San Francisco Railroad Companies own most of its capital stock.

(5) That these corporations caused the mortgages to be executed on the franchises, rights, and property, including the land grant, and caused the bonds to be issued and guaranteed their payment, and took the bonds when so issued and now hold them.

(6) That they virtually own and control the Atlantic and Pacific
Company and all its property, together with its mortgage
462 and bonded indebtedness; and are holding them and allowing the company to maintain a mere nominal existence.

We have now given a brief history of the facts connected with this grant from its beginning to the present time, passing over a period of nearly eighteen years and extending nearly eight years

beyond the time when the main line should have been completed to enable them to control the land grant at pleasure under their construction of the law.

The rules of law governing this grant are similar to those governing other grants heretofore reported by your committee.

The granting act in its main features is almost an exact copy of the act making the grant to the Northern Pacific Company, and what we said in that case is also applicable in this.

The third section of the act contains the following language:

That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company * * * every alternate section of public lands, not mineral, designated by odd numbers, &c.

The eighth and ninth sections read as follows:

SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the 4th day of July, A. D. 1878.

SEC. 9. And be it further enacted, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Whatever may have been the earlier rulings upon the subject, it is clear that under the third, eighth and ninth sections just quoted the Atlantic and Pacific Company took at the date of the act an estate *in presenti* upon conditions subsequent. (Rutherford *vs.* Green's Heirs, 2 Wheat.; Louissen *vs.* Price, 12 Howard, 59; Schulenberg *vs.* Harriman, 21 Wall., 149; Van Wyck *vs.* Knevals, 16 Otto; Opinion of Attorney General Devens, 16; Opinion Attorney General Brewster, Ex. Doc. 31, 1st Sess., 48th Congress; Leavenworth, &c., R. R. Co. *vs.* U. S., 92 U. S. Reports, 741.)

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This being a grant *in presenti*, vesting the title of the lands described in the grant in the company as we have shown, the question arises how that title can be divested. In the case of Schulenberg *vs.* Harriman, above cited, it is held that it requires an act of Congress declaring a forfeiture in order to divest the company of the title. As the law now stands Congress must take the initiative by either declaring a forfeiture by direct enactment to that effect, or it must pass a law conferring jurisdiction on the courts. In other words, it seems that under the opinion in case of Schulenberg *vs.* Harriman, that Congress has the exclusive jurisdiction to declare a for-

feiture. It is held in the case of Farnsworth *vs.* Minnesota and Pacific Railroad Company, 92 U. S., page 66, that—

A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant or their possession, when forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions.

Confirming the rule laid down in the above-cited cases.

Your committee have uniformly held that Congress possesses the power to declare these grants forfeited, and have reported several bills for that purpose, two of which have already passed the House. And we may state, also, that of all the learned counsel who have appeared before us none of them have taken issue with the law as we have just stated it. They all agree that Congress has jurisdiction to declare a forfeiture in all such cases.

The question rests upon a construction of sections 3, 8, and 9. The attorneys for the company claim that they constitute an absolute dedication of the lands to the purpose of construction and maintenance of the road. They contend that there is no condition subsequent whatever, and that the only power in the United States is the power through Congress to adopt such measures as
464 may be necessary to insure a speedy completion of the road in case the company fails to build it.

The third, fifth, eighth, and ninth sections of the act we are here considering are in substance the same as the like numbered sections in the Northern Pacific grant; and what your committee said in the report made by Judge Henley to the House at the present session in that case is equally applicable in this; therefore we adopt it, as follows:

On the other hand, your committee regard this construction as utterly untenable, and are clearly of the opinion—

(1) That section 8 of the act declares a condition subsequent, viz: That the road shall be completed within a certain time, upon breach of which the grantor may declare a forfeiture.

(2) That section 9 is in no way repugnant to section 8, but while embracing all that is included therein, and to that extent perhaps cumulative, is also, in connection with section 5, a declaration of further and additional conditions subsequent, for breach of which Congress may interfere to protect the rights of the United States.

(3) That under either of said sections, or both together, the United States, by Congress, has the right to declare the grant forfeited for failure to build the road within the limitation.

I.

Section 8 is perfectly plain in the language used and the purpose contemplated. It declares in so many words that the grant made is given by the United States and accepted by the company "subject to the following conditions, namely, that the said company * * * shall construct, equip, furnish, and complete the whole road," &c.

This is too plain for any construction. Congress intended to provide, and did provide, that the road should be completed within a certain time, and that that should be a condition of the grant. If a condition, the grant is determinable upon its breach, at the option of the grantor.

The argument of the company rests upon the absence of express words declaring a reversion in case of the breach. That in the judgment of your committee, was entirely unnecessary in order to create an estate upon condition subsequent. The estate, so conditioned, is created by declaring the condition, not by declaring the result of its breach. The latter, re-entry or its equivalent, follows as matter of legal effect. Every lawyer knows the result of a breach of condition subsequent, and the statement of that result in any grant, adds nothing to the previous description of the estate created. The land does "revert" by operation of law upon the breach being enforced by re-entry or its equivalent; but the right to that re-entry depends upon no express provision that the land shall revert. It stands upon the condition declared and its breach. Upon this point we quote from the report of the public lands committee, made at this session of Congress upon the bill forfeiting the Texas Pacific land grant, reported to the House by Judge Payson:

"In other words, generally stated, the distinguished counsel for the company declares that in law the power to declare a for-
465 feiture of a grant made on condition subsequent for breach of the condition must be reserved to the grantor by express terms in the act making the grant, or it does not exist.

"No authority was produced to the committee except the statement of the attorneys asserting this extraordinary doctrine in support of it; but the interest being so great, we have examined the books on the question, and are not able to find a single authority in support of the proposition, and we believe none can be found.

"On the contrary, Washburn on Real Property, vol. 2, 3d ed., p. 15, asserts the rule to be, 'where the condition of a grant is express there is no need of reserving a right of entry for a breach thereof in order to enable the grantor to avail himself of it.' (See also Jackson *vs.* Allen, 3 Cowan, 220; Gray *vs.* Blanchard, 8 Pick., 284; Littleton, sec. 331.)

"Indeed, all the decided cases we can find, as well as the text books, are in harmony and to the same effect; so we do not present argument upon it here."

The estate is created by proper words of description declaring the condition, and the legal effect of what follows the breach is exactly the same whether it be described in the grant or not. Thus in the case under consideration the estate upon condition is created by the specific language used. The legal effect of reversion follows the breach and declaration of forfeiture. No provision that the land should revert was necessary, and if added would simply have described the legal result of what preceded it.

The Touchstone, page 122, thus describes the operative words creating an estate on condition:

"Conditions annexed to estates are sometimes so placed and con-

founded among covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, for the most part conditions have conditional words in their frontispiece, and do begin therewith, and that among these words there are three words that are most proper, which in their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*.

Washburn, in his work on Real Property, marginal page 445, says:

"Among the forms of expression which imply a condition in a grant the writers give the following: 'On condition,' 'provided always,' 'if it shall so happen,' or, 'so that the grantee pay, &c., within a specified time,' and grants made upon any of these terms vest a conditional estate in the grantee."

When the condition of a grant is express, there is no necessity of reserving a right of entry for breach of the condition in order to enable the grantor to take advantage of it. (Jackson *vs.* Allen, 3 Cow., 220; Gray *vs.* Blanchard, 8 Pick., 284.)

That the words "upon condition," and even words less specifically expressing the intent, are construed as establishing an estate upon condition subsequent, without further description, is shown by many authorities. (Littleton, pp. 328, 329, 330, Com. Dig. Condition A 2; 2 Wood, Com. Powell's ed., 505, 512, *et seq.*; Wheeler *vs.* Walker, 2 Conn., 201; Thomas *vs.* Record, 477 Me., 500; Sharon Iron Co. *vs.* Erin, 41 Penn. St., 341; Taylor *vs.* Cedar Rapid R. R. Co., 25 Iowa, 371; Attorney General *vs.* Merrimack Co., 14 466 Gray, 612; Hadley *vs.* Hadley, 4 Gray, 145; Rawson *vs.* School District, 7 Allen, 128; Caw *vs.* Robertson, 1 Selden, 125; Pickle *vs.* McKissick, 21 Penn. St., 232; Hooper *vs.* Cummings, 45 Me., 359; Chapin *vs.* School, 35 N. H., 450; Wiggin *vs.* Berry, 2 Foster, 114; Hayden *vs.* Stoughton, 5 Pick., 534; Wright *vs.* Tuttle, 4 Day, 326.)

Authorities upon this point might be multiplied. It is the construction of principle and authority, and your committee have been referred to no case which in their judgment militates at all against the position here assumed. The Touchstone, at page 122, immediately following the quotation which we have made, is suggested as modifying the authority of the citation in its applicability to the case under consideration. But no such effect can possibly be given the language used. After stating the broad proposition quoted, the writer proceeds to say that although the words mentioned are "the most proper words to make conditions," yet that they are sometimes used for other purposes. He then points out instances where the word "proviso" in certain particular relations may be given a different meaning. But the entire discussion is limited to that particular word—does not once mention the words "*sub conditione*," or name a single instance where they are used in a sense contrary to the general rule, and even in respect to the word "proviso" the exception could not apply to the case under consideration, for it is ex-

pressly limited to a use of the word where it does not stand "originally, by and of itself."

The other authorities to which we have been referred are not in any sense repugnant to the view of the law we adopt. They are few in numbers, and at the best simply hold that these apt words may, in certain instances, be restricted by immediate reference to other portions of the deed clearly expressing a different intent in the grantor. That this is true is not denied; but it does not change the general rule, and its applicability to the case under consideration will more properly be noticed hereafter.

We are, therefore, clearly of the opinion that section 8 of the act, by the express language used, created an estate upon condition subsequent, forfeitable upon breach of the condition.

II.

Section 9 of the act, while perhaps embracing the preceding section within its provisions, and possibly to that extent cumulative, is also a provision prescribing certain other and additional conditions subsequent.

It will be noticed at the outset that by its specific language it embraces more than one grant, the exact words being "the several conditioned grants herein" and that it relates to a "further" condition. The "further" condition was that if the company should make any breach of "the conditions hereof" and the same should continue for a year, then the United States might, &c. Now, it is obvious upon the mere reading that this language does not primarily relate to section 8, for that section only appertains to one grant, needs no "further" condition, and the provision that the default should continue for a year or upwards would have no pertinence. This section evidently relates to some other condition or conditions than that mentioned in section 8.

These other conditions or requirements are found in section 5, which provides that six separate and distinct things should be done by the company, viz: 1st, that the road should be constructed
467 in a substantial and workmanlike manner, equal in all respects to first-class railroads; 2d, that it should be made of rails of the best quality, manufactured from American iron; 3d, that a uniform gauge should be established throughout the entire line; 4th, that the company should construct a telegraph line of the most improved and substantial description; 5th, that it should not charge the Government higher rates than individuals; and 6th, that it should permit other railroads to make running connections on fair and reasonable terms. These are the other and further conditions mentioned by section 9, in default of any of which, continuing for a year, Congress should have the right to "do any and all acts and things" to secure the "speedy completion of the said road," as contemplated and provided.

The intent of Congress, expressed with abundant precision in the act itself, and, as every one knows, as a matter of history, was to insure the construction, within the time prescribed, of a substan-

tial, first-class, and thoroughly equipped railroad from Lake Superior to the Pacific, suitable and available in all emergencies for use by the United States—in peace for the transmission of its mails; in war for the carrying of troops and supplies. Congress did not donate 48,000,000 acres of the public domain to this company without expecting and requiring some equivalent. Among the things it did require was the construction of a first-class road for the purposes and in the manner indicated. It accordingly prescribed the various requirements above recited, and to insure obedience to its mandates it provided by section 9 that in default of any of the same Congress might do anything necessary to complete the road in the manner contemplated and prescribed. The enactment of these provisions would have been futile had no reservation been made of a right to enforce them. Without such a reservation the Government, upon default of the company, would have had nothing left except a claim against the company for breach of contract or of covenant. To prevent such a condition of affairs the right was reserved to further legislate to compel obedience to its mandates. These requirements then became additional conditions subsequent, which Congress could enforce by forfeiture or by any other remedy deemed appropriate and adequate. That was the object, scope, and intent of section 9, and it is expressed in unambiguous phrase.

It is no answer to this proposition to say that these requirements might be enforced by the general forfeiture provided by section 8. The road might have been built within the time limited and yet every one of these conditions been broken. The grant could not then have been forfeited at all under section 8. A road would have been completed, and though built in absolute disregard of all the requirements of section 5, the Government would have been powerless either to resume the grant or compel the company to perform the condition. That section 9 relates to other conditions than that mentioned in section 8 is also apparent from the use of the words "and allow the same to continue for upwards of one year." These words, if applied to the conditions mentioned in section 5, mean something. If applied to section 8 they are nonsensical. If Congress had intended to extend the period mentioned in section 8 one year, it would have said July 4, 1877; not July 4, 1876, and another year thereafter.

It is thus apparent that section 9 of the act has a scope and effect far beyond anything embraced by section 8; that it legis-
468 lated upon further and additional subjects; has a separate and distinct function of its own, and that instead of limiting or controlling the preceding section it creates additional obligations and liability on the part of the company.

The only answer to this position advanced by the company is the suggestion that if this be true then the two sections are utterly inconsistent with each other. It is difficult to understand how this can be seriously urged. We have already shown a different legal scope and operation for each under the construction we have adopted. They are not repugnant or inconsistent in the slightest degree. Each stands for its own particular purpose. On the other hand,

the construction contended for by the company would violate well-established rules of construction simply to disregard the plainly expressed intent of Congress. They claim that the two sections should be taken together, and that so taken all that Congress could do upon failure of the company to build the road would be to take all necessary steps to compel its completion without power to forfeit the grant.

This position is untenable under the rules of construction because, first, it assumes an ambiguity, and then to reconcile it rejects the usual and ordinary signification of terms and phrases; twice reads as singular a word in the plural, and construes "further condition" as if the word "further" was omitted; second, with reference to a simple time condition, viz: that the road should be built by July 4, 1876, it adds the senseless expression, "provided the same shall continue unbuilt one year;" third, it excludes all of section 3 from its relations and connections with section 9 and either rejects it entirely or makes it practically inoperative; fourth, it violates the manifest general intent of the entire act and the general policy of Congress prevailing at the time in respect to these grants.

Another consideration is to be noticed. The provision of section 9 is permissive or directory only. Congress may do all necessary things, &c. It is not mandatory, as it would have been if intended as the sole remedy for the breach of the condition of section 8. So, too, it is not exclusive of other remedies for the breach. Congress may in that way enforce the forfeiture or may do it otherwise.

We have been referred to some authorities which are supposed to sustain the forced construction of the act contended for, but after the most careful examination of them we are unable to recognize any doctrine contrary to that we have adopted for our guidance. The strongest cited are undoubtedly the cases of the Episcopal Mission *vs.* Appleton *et al.* (17 Mass., 326), and Stanley *vs.* Colt (5 Wall., 119). They do not establish any new doctrine or any principle repugnant to the authority of the long line of cases we have cited.

In the former, the supreme court of Massachusetts, speaking of a voluntary deed for charitable purposes, say:

"Although the words 'upon condition' in a conveyance of real estate are apt words to create a condition, any breach of which will forfeit the estate, yet they are not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, is otherwise."

And in the latter, the Supreme Court of the United States, speaking of a devise for certain charitable purposes, say:

"It is true the word 'proviso' is an appropriate one to con-
469 stitute a common-law condition in a deed or will; but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument," &c.

The principle announced by these decisions is simply the universal rule of construction giving effect to the real intent of the parties to an instrument when the same can be fairly ascertained

from the language used. In other words, that technical expressions and phrases ordinarily yield to a contrary plainly expressed intent. But the principle has no applicability to the case under consideration, for there is no intent, either expressed or to be reasonably implied, contrary to the technical meaning of the words "upon condition." On the contrary, the act from beginning to end displays in every line a most deliberate, well-considered, and matured intention not to bestow this princely gift without so circumscribing and limiting the company by these conditions as to secure the object, and every object, which Congress had in view. It shows the clearest intention in the mind of Congress to create a condition subsequent, forfeiting the grant for failure to build the road within the prescribed period; and also other conditions subsequent, putting it in the power of Congress, even after the road had been built, to enforce the requirements of the act touching the manner of its construction. In the judgment of your committee, there is not a word in the act indicative of an intent to limit or curtail the technical words of condition used.

And aside from the language of the act itself, it is incredible that Congress could have intended, in this probably the largest and most valuable grant of lands ever made to a railroad company or a State, to depart from the uniform and uninterrupted policy of legislation for years, and allow the company to appropriate this vast belt of the public domain without restriction, reservation or control. Your committee cannot subscribe to such a doctrine and can find no argument, even plausible, to support it. We are clearly of opinion that Congress intended to provide for a forfeiture upon failure to build the road within the prescribed period, and that the language used was abundantly sufficient in law to accomplish that intent.

III.

Your committee are also well satisfied that even under section 9 of the act, in the sense in which it is construed by the company, Congress had and has the power to declare a forfeiture. It is conceded that under it Congress can do any and all acts and things needful and necessary to insure a speedy completion of the road. Congress is the sole and exclusive judge of whether the road has at any time, in point of fact, been completed; and if not, what remedy should be applied. The remedy of forfeiture is included within the general power reserved. The road is in fact uncompleted to this day. Congress can now, by virtue of that very reservation, so strenuously insisted upon by the company as protecting the grant, declare the same forfeited and restored to the public domain. Might not the forfeiture of the grant in the hands of this company and the consequent creation of an open field for equal competition best conduce to the speedy ultimate completion of the entire line. If Congress so view the matter, there can be no doubt of its power to declare the forfeiture under the very clause of the act relied upon by the company for its protection.

Other Objections Urged against the Forfeiture Considered.

The granting act was silent upon the authority of the company to mortgage its grant. And it is insisted that doubts were entertained among capitalists as to whether the company could make a mortgage without this authority was expressed by Congress, and this greatly embarrassed and prevented the utilization of the grant to raise money for the construction of the road. Hence, the company urged Congress to pass an act on April 20th, 1871 (Stat., vol. 17, p. 19), granting express authority to the company to so mortgage. And after asking and getting this act passed, which was said to be so necessary to aid the company in raising money to build the road, it is now insisted that it presents an additional reason that it was intended by Congress to create a trust fund to build this road, with conditions that if the company did not apply the fund to the prescribed use within a specified time, or if the mortgagees of the said company did not so apply the same within another specified time, that then the Government might take any and all steps to secure its intended application, so far as it had not previously been applied.

This is a strange construction to be placed upon the act. Not a single authority is cited by the able counsel for the company in support of it; and we venture to assert none can be found in any respectable law book in the land. No trust is created, either express or implied, in the act; no trustee is named or provided for, for none exists, and we will not therefore waste time in producing argument and citing authorities against this misconstruction.

After giving the express right to mortgage, the act of April 20th, 1871, above referred to, contains the following proviso:

Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage
471 made by the company to the lands granted to it by said act shall extend only to as much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

The attorneys for the trustees of the bondholders under the first mortgage made by the Atlantic and Pacific Railroad Company assume: 1st. That this proviso is equivalent to a declaration that on default made by the company in complying with any of the conditions of the grant, the mortgagees should have the right to all the lands embraced in the grant which were coterminous with the completed road at the time of foreclosure.

If this construction is the correct one, and, as we have shown, the mortgagors and mortgagees are the Saint Louis and San Francisco and the Atchison, Topeka and Santa Fe Railroad Companies, and that these two companies have constructed and are operating and controlling all the road which has been completed (except the 34 miles), then they have complete control of the grant. They can hold it for a hundred years without completing another mile of

road, and the Government can do nothing, no matter how many breaches of the contract may be committed.

We do not agree with the learned counsel in this construction of the proviso. If they are correct why should Congress say "that if the company suffer any breach of the conditions of the act" under which it was organized the rights of those claiming under any mortgage made by the company should extend only to the lands coterminous with completed road? Why not have said that the right of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as is coterminous with the completed road at the time of the foreclosure of said mortgage?

If this language had been used and none other the construction contended for would be correct. But this language was substantially used, and also the other language set forth in the proviso, which destroys the construction placed upon it by the attorneys of the mortgagees; and which, in the opinion of your committee, clearly shows that it was the legislative intent to limit the rights of the mortgagees to the lands coterminous with the completed
472 road at the date of the breach of conditions set forth in the original act, and not at the date of the foreclosure of the mortgage. This we think is the clear legal expression of the act. Any other construction would destroy the effect of one-half of the language in the proviso by treating it as surplusage. This cannot be done here without violating the rules of construction and thereby doing great injustice to the Government.

If the construction thus placed upon this proviso be correct Congress has the right to forfeit all the lands granted without regard to the mortgage, for it was executed after breach of the conditions subsequent had occurred. The mortgagees acquired no rights under the mortgage which could prevent Congress from declaring a forfeiture. They knew of the breach and took their chances.

But it is further insisted that this act of Congress last referred to authorized the company to execute a mortgage on its property and franchises, and issue bonds, and is therefore in the nature of a waiver or bar to the power of Congress to do any act by which the interests of the mortgages may be affected detrimentally.

This position is not tenable. Congress, by the passage of said act, did not authorize the company to mortgage the unconditional fee; but, upon the contrary, expressly reserved all the conditions expressed in the original act. The company did not own the unconditional fee in the lands granted. It owned the fee charged with the conditions subsequent, and it could mortgage and the mortgagees could only take under the mortgage such estate as the company owned at the time the mortgage was executed.

The mortgagees must be held to have known that they were taking an estate which was defeasible upon condition broken. They stand in the place of the mortgagor. There being a breach of the conditions subsequent by the failure of the company to complete its road within the time fixed by the grant the mortgagees must take whatever consequences a forfeiture imposes, which is the loss of the

defeasible estate in so much of the lands granted by the third section of the granting act as the bill accompanying this report
473 provides for. They will still retain if the bill passes their lien on the right of way, &c., granted by the second section of said act.

That we are right in these conclusions we think the authorities abundantly show. In Kent (vol. 4, p. 125) the rule is laid down as follows:

Persons who have an estate or freehold subject to a condition are seized and may convey, though the estate will continue defeasible until the condition be performed or released, or is barred by the statute of limitation, or by estoppel.

Greenleaf's Cruise on Real Property (vol. 2, pp. 44, 52) thus lays down the doctrine:

Where a person enters for a condition broken the estate becomes void *ab initio*; the person who enters is again seized of his original estate in the same manner as if he had never conveyed it away. And as the entry of the feoffer for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate together with all charges and encumbrances created by the feoffer during his possession; for upon the entry of the feoffee he becomes seized of an estate paramount to that which was subject to these charges.

Washburn on Real Property is to the same effect (vol. 2, p. 11, marginal page 45):

When such entry had been made the effect was to reduce the estate to the same plight, and to cause it to be held in the same terms as if the estate to which the condition was annexed had not been granted.

Question of Time More Fully Considered.

The time within which a condition subsequent is to be performed is, in this case, as much the essence of the contract as any other part or requirement of the condition. Not even equity will relieve against failure to perform within the time allowed a condition subsequent. Especially is this so when the time for the performance of the condition is fixed by statute, as in this case. (In Farnesworth *vs.* M. and P. R. R. Co., 2 Otto, 49; 2 Story, Equity Juris., 103; 26 Willard's Equity Juris., 1324; 3 Washburn on Real Property, 17, m. p. 455.) Nor where parties have fixed the time of performing the contract, unless sometimes in case of sale of land for money and damages for delay is mere matter of computation of interest. (Boardman *vs.* Imrick, 10 Cal., 96; 2 White & Tudor's Leading Cases in Eq., 1105; 2 Jones on Mortgages, 1185; 2 Washburn on Real Property, 17.) The grant being one *in presenti*, with condition subsequent, on failure to perform the condition within the time
474 stipulated the right to declare a forfeiture became perfect.

A condition not performed within the specified time when time is a part of the condition can never be performed.

A railroad to be built by the 4th day of July, 1878, cannot after that date be built within that time.

Time in this case was of the essence of the condition:

(1) Because it was expressly stipulated;

(2) Because it was fixed by statute;

(3) Because the value of the land would increase by lapse of time; and,

(4) Because the object of the grant was to promote the early development of an unsettled portion of the country. Any one of these is sufficient to make time the essence of the conditions subsequent. (See Pumroy on Contracts, secs. 383, 384, 385, 386.)

The withdrawal of a large body of land, amounting to many millions of acres, from market and settlement without the building of the road, retards, instead of promotes, the development of the country, and therefore defeats the very object of the grant. Congress does not make grants to aid in the construction of a road in portions of the country already well settled, nor does it authorize lands to be withdrawn from market and held in reservation or in trust to be given as a reward for the construction of a road after the country is well settled, for in thickly settled regions railroads will be built without Government aid.

We have already shown by authorities cited that when time of performance is fixed in the instrument, or by statute, or is of the essence of the condition, or compensation for breach cannot be made—and all these elements are contained in this condition—it must be strictly performed, whether it is a condition precedent or subsequent.

(1. Broom and Hadley's Com., 602 (Waits's ed.), note 277; 2 Redfield on Wills, 286, note; Taylor's Landlord and Tenant, p. 240, sec. 282; 1 Bouvier's Institutes, 759, 760; Tyler on Ejectments, 179.)

A forfeiture for breach of condition may be waived. But
475 a waiver cannot be implied by silence. (B. and M. R. R. Co. *vs.* Boestler, 15 Iowa, 125; Jackson *vs.* Brock, 1 Johnson's Cases, 125; Lawrence *vs.* Gifford, 17 Pick., 366; Pike *vs.* Butler, 4 N. Y., 360.)

Nor is a forfeiture waived by delay in enforcing it. (Gray *vs* Blanchard, 8 Pick., 284; Pery *vs.* Davis, 3 C. B. (N. S.), 769; Doe *vs.* Allen, 3 Taunt, 78; Calderwood *vs.* Brooks, 28 Cal., 151.)

It must be remembered that the will or intent of Congress can never be implied from silence. It must always be ascertained from enactments and resolutions. No waiver or forfeiture can be presumed by Congress, unless such waiver is made by statute or resolution, either expressly or by fair implication from the provisions expressed.

In construing public grants, all doubts which exist are to be resolved in favor of the Government and against the grantee.

Obligation of the Government in Regard to Indian Title.

It is asserted by the attorneys of the company that the Government obligated itself, by the granting act, to extinguish the Indian title and survey the lands in the Indian Territory; and they claim that both were indispensable to the complete utilization of the

grant by its beneficiary. The realization of aid from the grants pledged by Congress to secure the construction of the road, and the possibility of reimbursement by profitable carrying trade in the operation of a constructed road, were necessarily dependent upon the promised change in the legal conditions of the land titles along the prescribed route of the proposed road. They insist that the United States has not even attempted to fulfill its promise to extinguish the Indian titles.

All this is insisted upon with a pretended belief that it is based upon a fair construction of the granting act. The general route of the road, as prescribed by this act, runs from the west line of the State of Missouri, for 350 miles through the Indian Territory, which was prior to said grant set apart by the Government for the benefit of the Indians. The ultimate fee is vested in the United States,
but which, by treaty stipulations, statutory enactments, and
476 executive acts thereunder, have been set apart and reserved
for the sole use and occupancy of certain Indian nations and tribes so long as their national or tribal organizations are preserved. The boundaries of this section of country are defined by various treaties with these nations and tribes, and by legislative acts which prescribe the limits of the contiguous States and Territories of the Union. The public land system has never been extended over it. Congress has never taken any action to have it surveyed as public land. Much of it is held by four nations, the Choctaw, Chickasaw, Cherokee, and Creek, who have patents in accordance with treaties and laws, and all attempts to induce Congress to organize it into a Territory of the United States have, up to this time, failed.

This is enough to show that the company has no grant of land in this Territory, neither present or prospective, in our opinion. None was intended to be conferred by the act, except as such grant might be acquired from the Indians by said company. Let us examine the granting act for a moment.

The pretended claim of the company for the survey of the lands in this Territory is based upon the fourth and sixth sections of the act. If these sections stood alone and could be considered by themselves, or in connection with only the last clause of the second section; if there were no limitations to the grant as made by the third section, and if the seventeenth section was no part of the law, there might be some plausibility in the claim that the fourth and sixth sections required that the lands be surveyed as fast as the road was completed. But if we consider the law as a whole, as enacted, the claim is without foundation.

Under the third section the land to pass under the grant must be public land, situated in a Territory or State, the title of which is in the United States, and which has not been sold or otherwise appropriated at the time the map of location of the route of its road is filed in the General Land Office.

The lands in the Indian Territory are not public lands in the usual meaning of that term, and are not situated in a State or Territory of the United States. Certainly the United States, so
477 far as the lands within the boundaries of the Choctaw,

Chickasaw, Cherokee, Creek, and Seminole nations are concerned, does not possess full title to them; for they were, prior to the year 1866, the date of the granting act, set apart and reserved by the United States for the sole use and occupancy of various Indian nations and tribes. Therefore, the claim that these lands were included in the grant under the third section cannot be maintained.

Your committee is of the opinion, after a careful examination of the whole act, that no land was granted to the company in the Indian Territory except such as might be acquired by the company from the Indians by virtue of the seventeenth section. This section authorized the company to accept any grant from an Indian tribe or nation through whose reservation its road might pass, subject to the approval of the President of the United States. This is the privilege conferred by the act, and we believe that the last clause of the second section only becomes applicable when this is done:

And "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

The company at the beginning acted upon this construction of the law. This is fully shown by the files of the Interior Department.

If asked permission of the Interior Department, and leave was granted to open negotiations with some of the Indian tribes to effect a grant of lands, but was not successful in its efforts with the Indians. Thus the company by its acts admitted that there were no lands granted to it other than the right of way which was provided for in the treaties between the Government and the Indians.

The company never set up any claim that it received any land by the grant in the Indian Territory until the year 1877—eleven years after the act was passed.

The Interior Department holds that no lands were granted to this company in the Indian Territory. This has been the uniform ruling of that department on the subject. It was the ruling
478 of the Hon. J. A. Williamson, while he was Commissioner of the General Land Office, who is now attorney for the company.

Your committee therefore finds that there is nothing in the claim of the attorneys of the company that the Government has failed in extinguishing the Indian titles and surveying the lands in the Indian Territory, as no grant of land was made to the company in said Territory.

We therefore, in view of the law and facts set forth in this report, recommend the passage of the accompanying bill as a substitute for all bills introduced in the House for the forfeiture of the land grant made to the Atlantic and Pacific Railroad Company:

A bill to forfeit the unearned lands granted to the Atlantic and Pacific Railroad Company "to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast" and to restore the same to settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands, excepting the right of way heretofore granted to the Atlantic and Pacific Railroad Company, by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July 27th, 1866, and acts and joint resolutions subsequent thereto, and relating to the construction of said road and telegraph, be, and the same are hereby, declared forfeited and restored to the public domain, and made subject to disposal under the general laws of the United States, as though said grant had never been made: Provided, that the price of the lands so forfeited and restored shall be $1.25.

And provided, that nothing in this act shall be held to impair any right that the United States may have in or to the lands not forfeitable by this act.

Views of the Minority.

To accompany bill H. R. No. 453.

The undersigned members of the Committee on Public Lands submit the following as the views of the minority:

We agree substantially to all the findings and statement of facts made by a majority of the committee, and upon them and the authorities cited we respectfully submit to the House that
479 Congress has the power and ought to declare a forfeiture of all the lands granted to the road except that coterminous with the 34 miles of road completed within the time fixed by the granting act. Almost every condition fixed by the act of July 27th, 1866, was broken, and all of the benefits sought to be accomplished by Congress by the grant have been lost to the country. By an ingenious system of trading and mortgaging between this and other subsidized roads it is claimed that this immense grant of lands has been earned, when in fact only 34 miles of road *was* constructed within the time fixed by Congress, and not exceeding 100 miles *has* ever been built by the company. If the grant is not forfeited it will in a great measure inure to the benefit of roads in no sense entitled to it. They have returned nothing to the Government for the lands. It will in effect be subsidizing roads after they have been constructed with the aid of subsidies from the Government.

The act of April 20th, 1871, entitled "An act to enable the At-

lantic and Pacific Railroad Company to mortgage its road," is sought to be interposed by the company to prevent a forfeiture. We cannot concur in such a construction of this act. The evident purpose of the act was to confer power on the company to mortgage such estate as it at the time had, subject to the conditions of the granting act, and not to enlarge its rights under the grant. This act authorizing the mortgage either does or does not give the mortgagees a lien upon the lands to which the road itself has no right. If it does then they are entitled to all the "lands coterminous with or appertaining to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." The mortgagees under this construction can for all time defeat a forfeiture by refusing to foreclose. We think that Congress intended to restrict the rights of the mortgagees to the lands appertaining to that part of the road completed on the 4th day of July, 1878. If it did not so intend, much of the act is meaningless. The mortgagees hold subject to the right and power of Congress to declare a forfeiture, and we are unable to see any good reason why this power should not be exercised. If it should be judicially ascertained that
480 the mortgagees have vested rights under this act, then a declaration of forfeiture will still have the effect to restore the lands to the Government, subject to the mortgagees' claim. While we do not concede any such right, we insist that even if such does exist, the forfeiture should nevertheless be declared, and the company made to understand that it has no claim upon any of the lands, and that some appropriate judicial proceedings be at once commenced to adjust and determine the rights of the mortgagees under the mortgage.

We recommend the accompanying bill, which is made a part of this paper, as a substitute for house bill 453 and the amendments reported by a majority of the committee.

THO. C. McRAE.
JOHN A. ANDERSON.
POLK LAFFOON.

A bill to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes.

Be it enacted by the Senate and House of Representatives in Congress assembled: SECTION 1. That all the lands, excepting the right of way, heretofore granted to the Atlantic and Pacific Railroad Company by an act, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, and subsequent acts and joint resolutions of Congress be, and the same are hereby, declared forfeited and restored to the public domain, and made subject to disposal under the general homestead laws of the United States as though said grant had never been made: Pro-

vided, this act of forfeiture shall not effect the rights of those claiming under any mortgage made by the said company by virtue of the act approved April 20th, 1871, to so much of the lands granted coterminous with or appertaining to that part of said road which was actually constructed by the company by the 4th day of July, 1878.

SEC. 2. That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption, or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said laws from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such
481 land under existing laws, he or she shall be permitted, within one year after the passage of this act, to purchase not to exceed 160 acres of the same, at the price of $1.25 per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of their rights under this act: Provided, that nothing in this act shall be so construed as to affect the title to any city, town, or village site where the same has passed to patent and been sold by the company.

SEC. 3. That the Attorney General of the United States be, and he is hereby, authorized and directed to institute proper legal proceedings to set aside and cancel any mortgage or mortgages that may have been executed by said company upon lands forfeited by this act.

Defendant rests.

Which was all the evidence offered in the case.

Plaintiff's counsel then moved the court to direct the jury to find a verdict for plaintiff.

Motion denied.

Exception taken.

The plaintiff, by its counsel, requested the court to give the jury the following instructions, to wit:

THE ATLANTIC & PACIFIC RAILROAD CO.
vs.
ROBERT MINGUS. } Ejectment. No. 4117.

Instructions Requested by Plaintiff.

1. The court instructs the jury that upon the undisputed facts of this case the law is with the plaintiff, and it is entitled to recover the possession of the premises described in the declaration. The jury are therefore directed to find a verdict of guilty.

2. If the jury believe from the evidence that the failure of the Atlantic and Pacific Railroad Company to construct its railroad pursuant to the act of Congress incorporating said company, to a point opposite the lands in controversy, was due to the failure of the Government of the United States to perform its own obligations under said act, then the Government had no right to forfeit the grant, and the act of Congress of July, 1886, is to that extent unconstitutional and void, and the jury, if they so believe, will find the defendant guilty.

482 3. By an act of Congress approved April 20th, 1871, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," it was enacted as follows: That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, "that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act, shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

Plaintiff has introduced sufficient proof of the due execution of certain mortgages securing bonds issued under authority of said act of Congress, covering the lands granted to it within the Territory of New Mexico, and among other the land in controversy. You are instructed that by this act the United States subordinated whatever right it had to forfeit the said grant to the rights of the holders of bonds under such mortgages until foreclosure, and that until foreclosure thereof, it was the right and duty of the company to hold, possess and preserve said lands for the ultimate security of such persons claiming under the mortgages.

If the jury believe from the evidence that the said mortgages, covering the land in question, have not been foreclosed, and that the bonds secured thereby are not yet due, either by their terms, or by any default of the company whereby they might become due,

483 then the act of July 6th, 1886, to forfeit said grant is void as to such lands, and the jury will find the defendant guilty.

Which instructions so requested were by the court refused, and to the ruling of the court refusing the same the plaintiff, by its counsel, then and there duly excepted.

Thereupon the court charged the jury as follows:

Judge's Charge.

District Court, Fourth Judicial District, Territory of New Mexico, County of San Miguel.

ATLANTIC & PACIFIC RAILROAD CO. *vs.* ROBERT MINGUS. } Ejectment. No. 4117.

GENTLEMEN OF THE JURY: This is an action of ejectment, brought by the plaintiff to recover possession of the premises described in the declaration. There is no dispute as to the material facts, and the only question is whether, admitting the truth of all the facts sought to be proven, the plaintiff is entitled to recover. This is purely a question of law, and is for the court to decide.

The plaintiff, The Atlantic and Pacific Railroad Company, was incorporated by act of Congress of July 27th, 1866, for the purpose of building a line of railroad to the Pacific ocean. To aid it in this work Congress, by the same act, granted to this company the alternate sections of land within a certain distance of its located line, upon condition, among other things, that it should complete its road within a certain time. The company only completed a part of its road within the prescribed time, and failed as to the remainder. On July 6th, 1886, Congress passed an act declaring the unearned portion of the grant forfeited; that is to say, so much of the grant as was opposite unconstructed road. The land in controversy is situated within the original limits of the grant, but also within the part thus declared forfeited by Congress and restored to the
484 public domain. It was afterwards patented by the United States, upon an entry, and upon this patent, and deeds thereunder, defendant relies for his defence; while the plaintiff insists that the patent is void and conveys no title, because the act of forfeiture was unconstitutional and void.

This is the sole question in the case, and I hold that the defendant has by his patent and title deeds thereunder, made out a good defense to plaintiff's claim, and that plaintiff cannot recover.

I therefore direct you to find the defendant not guilty. I hand you a form of verdict, which you will have your foreman sign and return into court as your verdict.

To the giving of which said instruction the plaintiff by its counsel then and there duly excepted.

Upon the verdict of the jury being returned into court, counsel for plaintiff gave notice of a motion for a new trial.

Which contains all the evidence introduced or offered by either party upon the trial of said cause, together with the objections made to certain parts thereof, the rulings of the court thereon, and the exceptions taken at the time; and also the instructions requested by plaintiff and refused by the court, and the instructions given by the court and the exceptions to the refusal and giving of said instructions respectively taken at the time.

And because the foregoing matters are not all of record in said cause, the plaintiff prays that this, its bill of exceptions, containing the same, may be signed, sealed, and made a part of the record therein, which is accordingly done this 22d day of December, A. D. 1892.

JAMES O'BRIEN,
Chief Justice, etc.

485 It is hereby agreed that the foregoing proposed record and bill of exceptions may be settled, signed, and sealed by the judge of said court, as the record on which the judgment in said cause may be reviewed by the supreme court, without further notice; and the time for proposing amendments thereto, or for settling said record and proposed exceptions is waived. It is further agreed that the several maps offered in evidence on the part of plaintiffs need not to be copied or duplicated, but the originals thereof may be transmitted to the clerk of the supreme court to be used on the hearing, the same as if duly inserted in the transcript.

Dated Las Vegas, N. M., this 22d day of December, A. D. 1892.

FRANK SPRINGER,
Attorney for Plaintiff.
LONG & FORT,
Attorneys for Defendant.

Upon the foregoing stipulation, the foregoing record and bill of exceptions are settled, signed, and sealed as those upon which the said cause may be heard in the supreme court.

Dated Las Vegas, N. M., this 22d day of December, A. D. 1892.

JAMES O'BRIEN,
Chief Justice, etc.

486 TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Miguel A. Otero, clerk of the fourth judicial district court, for the Territory of New Mexico, sitting in and for the county of San Miguel, do hereby certify that the above and foregoing contains a true and perfect transcript of the record, and proceedings, papers, and bill of exceptions, as signed by the judge of said court, in the case lately pending in said court, wherein The Atlantic and Pacific Railroad Company was plaintiff, and Robert Mingus defendant, as the same remain of record, and on file in my office.

Witness my hand and the seal of said court, this 22d day of December, A. D. 1892.

[SEAL.] M. A. OTERO, *Clerk.*

487 And afterwards, to wit, on the third day of June, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors in said cause; which said assignment of errors was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, at the July Term, A. D. 1893.

THE ATLANTIC & PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* ROBERT MINGUS, Defendant in Error.	Error to the Fourth Judicial District Court in and for San Miguel County.

Assignment of Errors.

And the said The Atlantic and Pacific Railroad Company comes now on this the first day of the said term, by Frank Springer, its attorney, and Messrs. Britton and Gray, of counsel, and says that in the record and proceedings of the said cause in the district court for the fourth judicial district in and for the county of San Miguel there is manifest error in this, to wit:

First. In admitting *the* evidence upon the trial of said cause, over plaintiff's objection, the patent of the United States to Albert W. Bray, dated the tenth day of December, A. D. 1891, conveying the lands in controversy in this suit, and also the deeds from Albert W. Bray to Ezra E. Griffith, dated March 15th, 1892, and from Ezra E. Griffith to Robert Mingus, executed March 24th, 1892, conveying the same land.

Second. In admitting in evidence upon the trial of said cause the act of Congress of July 6th, 1886, over plaintiff's objection.

Third. In denying plaintiff's motion to direct the jury to find for the plaintiff.

Fourth. In refusing to give to the jury each of the several instructions requested by the plaintiff, in the words following, to wit:

1. The court instructs the jury that upon the undisputed facts of this case the law is with the plaintiff, and it is entitled to recover the possession of the premises described in the declaration. The jury are therefore directed to find a verdict of guilty.

2. If the jury believe from the evidence that the failure of the Atlantic and Pacific Railroad Company to construct its railroad, pursuant to the act of Congress incorporating the said company, to a point opposite the lands in controversy, was due to the failure of the Government of the United States to perform its own obligations under said act, then the Government had no right to forfeit the grant, and the act of Congress of July, 1886, is to that extent unconstitutional and void, and the jury, if they so believe, will find the defendant guilty.

3. By an act of Congress approved April 20th, 1871, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," it was enacted as follows: That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27th, 1866, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds the said

company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, "that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

Plaintiff has introduced sufficient proof of the due execution of certain mortgages securing bonds issued under authority of said act of Congress covering the lands granted to it within the Territory of New Mexico, and, among other, the land in controversy.

488 You are instructed that by this act the United States subordinated whatever right it had to forfeit the said grant to the rights of the holders of bonds under such mortgages until foreclosure, and that until foreclosure thereof it was the right and duty of the company to hold, possess, and preserve said lands for the ultimate security of such persons claiming under the mortgages.

If the jury believe from the evidence that the said mortgages covering the land in question have not been foreclosed, and that the bonds secured thereby are not yet due, either by their terms or by any default of the company whereby they might become due, then the act of July 6th, 1886, to forfeit said grant is void as to such lands, and the jury will find the defendant guilty.

Fifth. In giving to the jury the instruction to find a verdict of not guilty in the words following, to wit:

GENTLEMEN OF THE JURY: This is an action of ejectment brought by the plaintiff to recover possession of the premises described in the declaration. There is no dispute as to the material facts, and the only question is whether, admitting the truth of all the facts sought to be proven, the plaintiff is entitled to recover. This is purely a question of law, and is for the court to decide. The plaintiff, The Atlantic and Pacific Railroad Company, was incorporated by act of Congress of July 27th, 1866, for the purpose of building a line of railroad to the Pacific ocean. To aid it in this work Congress, by the same act, granted to this company the alternate sections of land within a certain distance of its located line, upon condition, among other things, that it should complete its road within a certain time. The company only completed a part of its road within the prescribed time and failed as to the remainder. On July 6th, 1886, Congress passed an act declaring the unearned portion of the grant forfeited—that is to say, so much of the grant as was opposite unconstructed road. The land in controversy is situated within the original limits of the grant, but also within the part thus declared forfeited by Congress and restored to the public domain. It was afterwards patented by the United States upon an

entry, and upon this patent and deeds thereunder defendant relies for his defense, while the plaintiff insists that the patent is void and conveys no title because the act of forfeiture was unconstitutional and void. This is the sole question in the case, and I hold that the defendant has by his patent and title deeds thereunder made out a good defense to plaintiff's claim, and that plaintiff cannot recover. I therefore direct you to find the defendant not guilty. I hand you a form of verdict, which you will have your foreman sign and return into court as your verdict.

Sixth. In denying plaintiff's motion for a new trial.

Wherefore, for the errors aforesaid and the manifold other errors in the record and proceedings aforesaid of the said district court, apparent upon the face thereof, the said The Atlantic and Pacific Railroad Company prays that the judgment of the said district court in and for the county of San Miguel be reversed, annulled, and for naught held, and that the said plaintiff be restored to all things which by reason thereof it hath lost, and recover its costs in this behalf expended.

FRANK SPRINGER,
Attorney for Plaintiff.

BRITTON AND GRAY, *Of Counsel.*

489 And afterwards, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, New Mexico, on the last Monday of July, in the year one thousand eight hundred and ninety-three, the same being Monday, July 31, 1893, on the seventh day of said term, the same being Tuesday, August eighth, 1893, the following, among other, proceedings were had, to wit:

ATLANTIC AND PACIFIC RAILROAD COMPANY, Pl'ff in Error, *vs.* ROBERT MINGUS, Def't in Error.	529. Error to San Miguel County.

This cause, coming on for hearing upon the transcript of record, assignments of error, and briefs of counsel on file herein, is argued by Frank Springer, Esq., for plaintiff in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at the regular term of said supreme court last aforesaid, on the twenty-sixth day thereof, the same being Monday, October 2, 1893, the following, among other, proceedings were had, to wit:

ATLANTIC AND PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* ROBERT MINGUS, Defendant in Error.	529. Error to District Court of San Miguel County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the

present term, the court, being now sufficiently advised in the premises, files an opinion by Associate Justice Fall, Associate Justice Freeman concurring, affirming the judgment of the court below for reasons stated in their opinion on file, Associate Justices Lee and Seeds filing their opinion in favor of reversal, Chief Justice O'Brien not voting; and thereupon the court being equally divided, it is therefore considered and adjudged by the court that the judgment of the district court in and for the county of San Miguel, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith the said Robert Mingus go hence without day and recover of the said Atlantic and Pacific Railroad Company his costs in this behalf expended as well in the court below as in this court to be taxed, and that he have execution therefor.

490 And heretofore, to wit, on the 2nd day of October, 1893, there *was* filed in the office of the clerk of said court two opinions of the judges of said court in said cause, copies of which are hereunto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted; which said opinions are in words and figures following, to wit:

491 In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1893.

THE ATLANTIC & PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
ROBERT MINGUS, Defendant in Error.

Opinion.

FALL, *A. J.*, and FREEMAN, *A. J.*, in favor of affirmance:

This is an action of ejectment, brought by the plaintiff in error to recover possession of 120 acres of land situated in San Miguel county, N. M. The plaintiff claims title under act of Congress of July 27, 1866, the provisions of which necessary to be considered in this cause are as follows: "Be it enacted," etc. "Section 1. That John Brown, * * * John C. Fremont, * * * and all such other persons who shall be associated with them and their successors, are hereby created and erected into a body corporate and politic in deed and in law, by the name, style, and title of the Atlantic & Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue, plead, and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a company seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri; thence to the western boundary line of said State, and thence by the most

eligible railroad route as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river at such point as may be selected by said company for crossing. Thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point on the western boundary line of Arkansas, at or near the town of Van Buren.

492 And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide," etc. (Various details relating to the organization of the company.) "Sec. 2. And be it further enacted: That the right of way through the public lands be, and the same is, hereby granted to the said The Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of the railroad and telegraph line as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, etc., for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations; and the right of way to be exempt from taxation within the Territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy, and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. Sec. 3. And be it further enacted: That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by plat

thereof, filed in the office of the Commissioner of the General Land Office. * * * And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic & Pacific railroad." Section 4 provides the manner in which the railroad shall be examined by commissioners and accepted, and patents for lands issue as the road is constructed. Section 5 provides how the road shall be built. Section 6 provides for surveying of the land grant by order of the president, and withdraws from sale, entry, or pre-emption the said lands. "Sec. 8. And be it further enacted: That each and every grant, right and privilege herein, are so made and given to and accepted by said Atlantic & Pacific Railroad Company upon, and subject to, the following conditions, namely: That said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, A. D. 1878. Sec. 9. And be it further enacted: That the United States make the several conditional grants herein, and that the said Atlantic & Pacific Railroad Company accept the same upon the further condition that if the said railroad make any breach in the conditions hereof, and allow the same to continue for upwards of one year, then in such case at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." "Sec. 11. And be it further enacted: That the said Atlantic & Pacific railroad, or any part thereof, shall be a post-route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation." "Sec. 19. And be it further enacted: That unless the said Atlantic & Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void. Sec. 20. And be it further enacted: That the better to accomplish the object of this act, namely, to promote the public interest and welfare, by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of the said Atlantic & Pacific Railroad Company, add to, alter, amend or repeal this act." The defendant in error relied upon a United States patent issued December 10, 1891. There is no conflict in the testimony as to the facts upon which the rights of the parties depend. The cause was tried by a jury, and a verdict of not guilty returned. Judgment accordingly entered, from which plaintiff sues out writ of error to this court. Errors assigned are: The rulings of the district court admitting in evidence defendant's patent,
493 refusing to direct the jury to find for the plaintiff, refusing

the instructions requested by plaintiff, and directing the jury to find for the defendant.

There is no question here as to the proper organization of the company, including the subscription to the stock within the time fixed. The company surveyed and located its route, and filed its plats from time to time, and the alternate sections of land within the 40-mile limit on each side of the located line were withdrawn by order of the President, in accordance with the provisions of section 6 of the act. By the eighth section of the act the company was required to commence construction within two years from the date of the approval of the same, and to build not less than fifty miles of railroad each year thereafter, and to complete the "whole road" by July 4, 1878. On April 20, 1871, up to which date the company had not complied with its contract in reference to the annual construction required, an act of Congress was approved, which is as follows, viz: "An act to enable the Atlantic & Pacific Railroad Company to mortgage its road. Be it enacted," etc.: "That the Atlantic & Pacific Railroad Company, organized under act of Congress of July twenty-seventh, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations, as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of the said road which shall have been constructed at the time of the foreclosure of said mortgage." After the passage of this act the company executed mortgages to secure bonds due at various times from 1901 to 1922, the greater number of those bonds being guarantied by the St. Louis & San Francisco and Atchison, Topeka & Santa Fe Railroad Companies. The interest upon the bonds has been paid, and no breach, apparently, made in the conditions of the mortgage, except failure to construct the road with due diligence. Up to July 4, 1878, the date fixed for the completion of the road by the act of 1866, the company had completed less than 125 miles of road, all told; but prior to July 6, 1886, it completed 560 miles from Albuquerque west, and about 50 miles, as claimed, in the Indian Territory. The line from Sepulpa, about 125 miles from the initial point, Springfield, to Albuquerque, and from Mojave, 560 miles west of Albuquerque, remains to the present time uncompleted. On July 6, 1886, Congress passed the following act, viz: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That

all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, heretofore granted to the Atlantic & Pacific Railroad Company, by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby declared forfeited and restored to the public domain. Approved July 6, 1886." After the passage of this act, all the lands which had been prior to that time set aside and withdrawn under the act of 1866 were restored to the public domain, except those opposite and coterminous with the road actually constructed. Among the lands so restored was the tract now in question.

The question upon which we now have to pass is solely that of the validity or constitutionality of the act of 1886, known as the "forfeiture act." If the act is invalid or unconstitutional, the plaintiff should recover, for the grant was undoubtedly a grant *in præsenti;* floating, it is true, but becoming fixed upon the performance by the grantee of the conditions prescribed, and, when so fixed, taking effect as of the date of the granting act. Schulenberg *v.* Harriman, 21 Wall. 44, 60. Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 741. The title of the grantee under such an act is superior to a United States patent issued for lands within the grant limits, acquired subsequent to the date of the act. Wright *v.* Roseberry, 141 U. S. 488; U. S. *v.* Southern Pac. R. Co., 146 U. S. 593, and authorities *supra.* Defendant in error contends that the forfeiture act of 1886 is constitutional and legal;
494 that under section 9 of the act of 1866 power is expressly reserved to Congress to forfeit, and that such power exists even if no such reservation was intended to be made; that the mortgage act of 1871 is only declarative of the right to mortgage, and its purpose was to remove all doubt of that right, and thus aid the company in obtaining funds with which to construct the road; that the mortgagees took only the title vested in the company by the terms of the granting act, subject to the right of the United States to forfeit, and that the rights or equities of the mortgagees are not now for the consideration of this court. Plaintiff admits that if no right to forfeit had been reserved, and no consequences of a breach declared in the granting act, the right to forfeit would exist; but contends that, with the consequences of the breach expressly declared, these alone can ensue from a breach and exclude

the right to forfeit. Plaintiff also insists that the Government failed to comply with its part of the contract, as expressed in the grant, in reference to Indian titles, and that this failure of the grantor is largely responsible for the delay of construction by the grantee, and that the forfeiture act should not have been passed. Plaintiff further contends that the provisions of the mortgage act of 1871 show clearly that it was not the intention of Congress to reserve the power to forfeit in the act of 1866, and, further, that the mortgage act created a new contract, extending expressly the term within which the grantee was to complete construction, and that under its provisions contracts have been made which are violated by the forfeiture act of 1886.

This court, in the case of Southern Pacific Railroad Co. *v.* Esquibel, 4 N. M. 337, cited and relied on by counsel for defendant in error, held that "time was of the essence of the contract," and in construing a clause in the Texas Pacific act, similar to section 9 of the grant act of 1866, declared that the clause was for the benefit of the Government, and not of the company. The purpose for which this grant was made is repeatedly declared in the different sections of the act; that is, "to aid in the construction of a road, to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores to the Pacific coast." Section 20 of the act provides that to "better accomplish" the objects thereof, namely, "to promote the public interest and welfare," etc., and to "secure to the Government at all times * * * the use and benefit of the same (railroad and telegraph lines) for postal, military and other purposes, Congress may at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend or repeal this act." What stronger reservation could be desired? Are we to say, in the face of the provisions of sections 9 and 20, that the legislature and the courts are to have "due regard for the rights of the grantee," and no regard whatsoever for the rights of the United States or of the public, and shall not consider the public welfare, which is expressly declared to be the object for which this enormous grant was made? Are we to say that the Congress of the United States intended to create a corporation, give it the breath of everlasting life, grant to it sovereign powers of eminent domain, endow it with a princely estate vaster than a kingdom of the old world, and set it above the laws, above the courts, above the people, above the Government, making the "thing" greater than its creator? It is true that "a corporation created by the legislature, and endowed with certain powers and functions and property, the legislature reserving no interest in that which is given them, and no control over the succession of persons who form the corporation, or over the exercise of their functions, such a corporation is a private corporation, to whom a franchise has been given by a grant which is an executed contract, and that any deprivation of their property, or any disturbance or denial of their rights and functions, impairs the obligation of contracts." 3 Pars. Cont. 531; Dartmouth College *v.* Woodward, 4 Wheat. 519. It is also "a settled rule of construction that public grants are to be construed strictly,"

and, where the public interest is concerned, "any ambiguity in the terms of the contract must operate against the company and in favor of the public." Richmond R. Co. *v.* Louisa R. Co., 13 How. 81. Chief Justice Taney said: "The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations." Charles River Bridge *v.* Warren Bridge, 6 Pet. 548. Also 2 Inst. 496; Canal Co. *v.* Wheeley, 2 Barn. & Adol. 792. In the case of Northern Pac. R. Co. *v.* Traill Co., 115 U. S. 601, clause 20 of the act creating the Northern Pacific Railroad Company, exactly similar to clause 20 of the act under which the plaintiff company received its grant, was held to reserve to the United States the power to pass an act declaring that no land granted to the company should be conveyed, although earned, until the expense of survey of such lands had been paid by the company. It was urged that this last act was unconstitutional, upon the same ground as taken in the case at bar, and, indeed it was so held by the supreme court of Minnesota; but the Supreme Court, by Justice Miller, held that section 20 "conferred this power on Congress," by which not only was the grantee divested of its lands, but the taxing power of a municipal government denied.

495 Did Congress, by the mortgage act of 1871, extend the time during which the road might be completed? It is strongly contended that this was the intent and is the effect of the act in question. There is some ambiguity in the proviso of the act, and, there being necessity for judicial construction, it is our duty, as we conceive it, to consider the proviso in question together with the entire act, as well as the granting act to which it refers. It is urged that the company possessed the power to mortgage its franchises, property, lands, etc., before this declaration by Congress. This may be true, but there was evidently some doubt upon the subject. Power was granted them expressly to sue and be sued, etc., and they were "vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth." As shown from the record, the company had incurred a debt in 1871, were compelled to secure funds, and the act was passed. It is reasonable to presume that it was passed at the request of the company. Now, if it was the intention of Congress to do something more than affirm the right to mortgage; if it was conscience stricken at the failure of the Government to comply with its contract, as is urged, why was not a plain, direct declaration to this effect made? Why was the only intimation to this effect contained in the act the following: "Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage," etc., "shall extend only to so much thereof (lands) as shall be coterminous with or appertain to that part of the said road which shall have been constructed at the time of the foreclosure of said mortgage?" When this act was passed the company was in default. It had "suffered a breach" in having constructed

in five years only thirty-four miles of road; and from the terms of the act it is apparent that Congress intended to assure capitalists that no advantage would be taken then of this breach, hence the use of the word "hereafter." If it was intended to grant further and indefinite time to the company in which to construct the road, why was the expression used, "hereafter suffer any breach of the conditions of the act above referred to under which it is organized"? Was this not clearly and distinctly a recognition and reaffirmance of the conditions under which the company acquired its grant, with an assurance that no advantage would be taken of the breach already suffered? Did not Congress suppose, as a matter of course, that any mortgage would contain a condition of foreclosure upon breach of condition of the grant as well as upon failure to pay interest? Was this not done in the mortgages by the terms of which the party of the first part binds itself to construct the road with due diligence, and the second party reserves power to take possession and foreclose for any breach of the conditions of the mortgage? Would not any court construe "due diligence" in this case to mean within the time limited in the granting act? It has been strongly urged that up to the present time the mortgages could not have been foreclosed. This contention is not sustained by the facts as shown in the record. To sustain the contention of plaintiff, we must not consider any portion of the mortgage act except the last four words of the proviso. We must not consider at all the granting act. We must not look to the evident intention of the mortgagor and mortgagee, and their construction of the act. We must give the four words, standing alone, referred to, a strained construction, which would result in divesting the United States of forty-odd millions of acres of land forever, or at least during the pleasure of the mortgagees, without promoting in any sense the object for which the grant was made; and we must declare unconstitutional an act of Congress, passed after mature deliberation, careful investigation, and with a thorough knowledge of every phase of the case, as shown by the report accompanying the forfeiture bill. The grant would remain suspended in mid-air, as it were, until the Atchison, Topeka & Santa Fe Railroad Company, bondholder, graciously saw fit to foreclose its mortgage, or to construct the road at its own pleasure; and in the meantime no settler could obtain a homestead thereon, and no county or State revenue could be derived therefrom by taxation. The contention of plaintiff is equivalent to the proposition that this mortgage act is a license coupled with a grant. We think it a license, and, if correct, as Lord Chief Justice Vaughan said in Thomas *v.* Sorrell, Vaughan, 330, "a dispensation or license properly passeth no interest nor alters or transfers any property in anything." We construe this proviso by the rule laid down by an eminent English chancellor: "If you find the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter." It is true that we must consider not only the contract of the United States with the corporation, but also the rights of parties contracting with the corporation. 2 Morawitz Priv. Corp. § 1047; Black. Const. Prohib. 15. But here the mortgagee was by

the very terms of the mortgage act put upon notice of the condition of the granting act, and further notified, as we construe it, to this effect: "At the time of the foreclosure of your mortgage, if a breach has been committed, your rights will only pertain to lands actually earned at the time we take advantage of such breach." This construction is not so much strained as that contended for by plaintiff, is in conformity with the best interests of public policy, agrees with the conditions of the granting act, and is in accord with the intent of Congress as expressed by the act of 1866 and the forfeiture act of 1886.

496 Where there are two statutes, the one granting certain powers or privileges, and the latter extending the power to different subjects, even without mentioning the limitations of the former act to the subject of its grants, these limitations may by construction be held to attach to the new subjects, when such construction is in consonance with the manifest intention of the legislature. Chamberlain *v.* Chamberlain, 43 N. Y. 424. Mr. Justice Field said: "Instances without number exist when the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature." Eureka Con. Min. Co. *v.* Richmond Min. Co., 4 Sawy. 302; Reiche *v.* Smythe, 13 Wall. 162. Where the scope of a general provision is the subject of consideration, there is always a leaning not only to prevent obscurity, but injustice, for neither can be presumed to be intended. Plumstead Board of Works *v.* Spackman, 13 Q. B. Div. 878; Murray *v* Gibson, 15 How. 421. The intention of the act is what should be sought for, and the intent will always prevail over the literal sense of its terms. Cearfoss *v.* State, 42 Md. 406; Reynolds *v.* Holland, 35 Ark. 56. When two portions of an act of legislative grant are repugnant or in conflict, the established rule is that the former prevails over the latter. Fore *v.* Williams, 35 Miss. 533: *In re* Second Ave. Church, 66 N. Y. 395. It seems consonant with reason and good sense that a proviso, being properly intended to limit the language of the legislature, will not be construed to intend by doubtful words to enlarge or extend the act or portion of an act to which it is attached, and this appears to be the settled rule. Suth. St. Const. 297; *In re* Webb, 24 How. Pr. 247; U. S. *v.* Dickson, 15 Pet. 141; State *v.* Kelly, 34 N. J. Law, 363. It being settled beyond contravention that a legislative grant is to be construed strictly in favor of the State and against the grantee, it necessarily follows that nothing will pass against the State by implication. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Rice *v.* Railroad Co., 1 Black. 358; Ruggles *v.* Illinois, 108 U. S. 536; Gaines *v.* Coates, 51 Miss. 335; State *v.* Southern Pac. R. Co., 24 Tex. 80. It is presumed always that the law-makers have a definite purpose in every act. We must presume here that the mortgage act of 1871 was passed with a full understanding of the provisions and legal effect of the act of 1866; and that when Congress proceeded to pass the act of 1886, forfeiting the unearned lands, but "having due regard for the rights of the grantee," it was familiar with both the prior acts, and legislated knowingly. A part of one of these acts must be construed with

reference to the others upon the same subject. If inconsistent, we must attempt to harmonize; if the wording is unambiguous, and the meaning clear, we would not be at liberty to put a construction upon it evidently foreign to the intent of the law-makers, no matter what we thought of the justice of it; but, if there is ambiguity and uncertainty, to arrive at the intent we must construe the whole act and that to which it refers together, and are at liberty, certainly, to take into consideration all other acts upon the same subject. It has been well said that the general intent of the statute is the key to the meaning of the parts, and it is the established rule that the intention of the whole act will control the construction of the parts. 1 Kent. Comm. 461; Ogden *v.* Strong, 2 Paine, 584; Green *v.* State, 59 Md. 123; Railroad Co. *v.* Alexandria, 17 Grat. 176; Burke *v.* Monroe Co. 77 Ill. 610; Stone *v.* Mayor, etc., 1 C. P. Div. 691; Hough *v.* Windus, L. R. 12 Q. B. Div. 229; Jennings *v.* Love, 24 Miss. 249; Garby *v.* Harris, 7 Exch. 591; Reiche *v.* Smythe 13 Wall. 162; Williams *v.* McDonald, 3 Pin. 331. Power was reserved to Congress by sections 9 and 20 of the act of 1866 to forfeit the grant, or the unearned portion of the same, upon breach. The mortgage act of 1871 was declarative of the right to mortgage the property of the company, including the lands, and also, apparently, in the nature of an assurance that no advantage would be taken of the breach already suffered. The act of 1886 forfeiting the unearned grant was valid and constitutional.

It is our opinion that the judgment below should be affirmed.

ALBERT B. FALL, *A. J.*
A. A. FREEMAN, *A. J.*

497 In the Supreme Court of the Territory of New Mexico, July Term, 1893.

THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
ROBERT MINGUS, Defendant in Error.

Opinion of Lee, J., and Seeds, J., in Favor of Reversal.

This is an action of ejectment, brought by the plaintiff in error to recover possession of 120 acres of land situate in San Miguel county, N. M. The plaintiff claimed title under an act of Congress of July 27, 1866, granting lands to the Atlantic & Pacific Railroad Company, against which the defendant relied on the United States patent issued December 10, 1891. The case was tried to a jury, which, under the direction of the court, returned a verdict of not guilty, and judgment was accordingly rendered thereon in favor of the defendant. Plaintiff sued out a writ of error to this court. He has assigned as error the rulings of the district court admitting in evidence defendant's patent, refusing to direct the jury to find for plaintiff, refusing the instructions requested by plaintiff, and directing the jury to find for defendant. These various rulings are

brought before this court for review by exceptions properly taken. It appears from an examination of the record that they all raise substantially the same question, and therefore it will not be necessary for us to consider and pass upon them separately. There is no conflict in the testimony as to the facts upon which the rights of the parties depend. The facts appear to be undisputed, and, so far as they are deemed material to a decision of the case, are as follows:

The Atlantic & Pacific Railroad Company is a corporation, created by act of Congress, approved July 27, 1866, the essential provisions of which are as follows: "Be it enacted," etc.:
498 "Section 1. That John Brown, * * * John C. Fremont, * * * and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the Atlantic & Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue, plead, and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river, thence to the town of Albuquerque, on the River del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the 35th parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas, at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act, as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide." Then follow various details relating to the organization of the company. "Sec. 2. And be it further enacted: That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph line as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, etc., for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the

public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act. Sec. 3. And be it further enacted: That there be, and hereby is granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office." After a number of provisions which need not be quoted here, the section concludes: "And provided further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic & Pacific railroad." Section 4 provides the manner in which the railroad shall be examined by commissioners and accepted, and patents for lands issue as the road is constructed. Section 5 provides how the road shall be built. "Sec. 6. And be it further enacted: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." "Sec. 8. And be it further enacted:

That each and every grant, right and privilege herein are
499 so made and given to and accepted by said Atlantic & Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year

after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, A. D. 1878. Sec. 9. And be it further enacted, That the United States make the several conditional grants herein, and that the said Atlantic & Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." "Sec. 11. And be it further enacted, That said Atlantic & Pacific railroad, or any part thereof, shall be a post-route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose, restricting the charges for such Government transportation." "Sec. 19. And be it further enacted, That unless the said Atlantic & Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void. Sec. 20. And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend or repeal this act."

The organization of the company and subscription to the stock seem to have been carried out, in accordance with the provisions of the act, to the satisfaction of the Government, within the time fixed, and the company was in numerous ways afterwards treated as being duly organized to do business and exercise the powers conferred by the act of incorporation. It proceeded to survey and locate its railroad line along the general route prescribed by Congress, and from time to time the plats of location designating its line were filed with the Secretary of the Interior as required. Thereupon, by executive orders under the direction of the President of the United States, the alternate sections of public land within the 40-mile limits on each side of the located line were withdrawn from sale, entry, or preemption, as provided by section 6 of the act of Congress. Such withdrawal of lands in the Territory of New Mexico was made by letter of the Secretary of the Interior May 8, 1872, to take effect from March 12, 1872, the date of the filing of the location plats; and the lands within the grant limits from there westward to the Pacific ocean were similarly withdrawn, to take effect at various dates in the year 1872. The price of the public lands in the even-numbered sections within the grant limits, which were retained by the Government, was increased to double minimum, or $2.50 per acre. By the eighth section of the act of July 27, 1866, the company

was required to commence construction within two years from that date, and build not less than 50 miles of railroad per year thereafter. Up to April 20, 1871, it had built only 75 miles of road. On that date Congress passed an additional act authorizing the company to mortgage its road, franchises, lands, and other property to secure bonds to be issued to raise money for construction. That act is as follows: "An act to enable the Atlantic & Pacific Railroad Company to mortgage its road. Be it enacted," etc., "That the Atlantic & Pacific Railroad Company, organized under act of Congress of July twenty-seventh, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations, as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." Under the authority of this act the company executed mortgages covering the road and lands from Missouri to Albuquerque, N. M., to secure bonds to the aggregate amount of $3,590,629, and from Albuquerque to San Francisco for $16,000,000. The first of these includes the lands in controversy. These mortgages were duly executed and recorded in the office of the Secretary of the Interior, as required by the act. The bonds secured by them fall due at different dates from 1901 to 1922. The bonds were sold, and the moneys
500 realized from their sale used toward the construction of the road. They are still outstanding, and none of them will be due, according to their terms, before 1901. The interest has been paid. No default as to any of the mortgages has occurred, and none of them have been foreclosed, nor by their terms could have been, or can now be, foreclosed. By the 4th day of July, 1878,—the date fixed by the act of 1866 for the completion of the road,—the company had only constructed 125 miles westward from Springfield, Mo., the beginning point of the line. Afterwards, and prior to July 6, 1886, it built 50 miles more in the Indian Territory, and 560 miles westward from Albuquerque to The Needles, on the Colorado river, all of which was examined and accepted by order of the President of the United States. It also acquired by contract of purchase 243 miles of road upon its located line from The Needles to Mojave, Cal., which had been constructed by the Southern Pacific Railroad Company. The intervening portion of the line from Sepulpa, in the Indian Territory, to Albuquerque, and from Mojave to San

Francisco, in California, were in 1886, and still remain, unconstructed.

On July 6, 1886, Congress passed an act to forfeit the land grant to the Atlantic & Pacific Railroad Company appertaining to the unconstructed portion of its railroad line, and restored the land to settlement, which act is as follows: "An act to forfeit the lands granted to the Atlantic & Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled. That all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, heretofore granted to the Atlantic & Pacific Railroad Company, by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby declared forfeited and restored to the public domain. Approved July 6, 1886." Upon the passage of this act, all the lands within the grant limits which had been withdrawn from entry and sale by executive orders, as before stated, and which were opposite those portions of the railroad line not then constructed, were by order of the Interior Department declared to be restored to the public domain, and open for settlement and entry under the land laws. This included, among others, all the lands from the eastern boundary of New Mexico to Albuquerque, within which was the tract in controversy in this suit. This tract is shown by the testimony of the receiver of the land office of the district in which it is situated to be non-mineral public land, to which, on March 12, 1872, the United States had full title, and which at that date was not reserved, sold, granted, or otherwise appropriated by the United States, and was free from pre-emption or other rights or claims. It is part of an odd-numbered section within the 40-mile limits of the Atlantic & Pacific grant. It therefore falls within the class of lands which by the act of 1866 was granted to the Atlantic & Pacific Railroad Company, and as such was specifically included in the order of withdrawal of March 12, 1872, and from which withdrawal it was subsequently, after the act of July 6, 1886, released, and restored to entry. It was entered as a

pre-emption January 9, 1888, and patented to the grantor of defendant December 10, 1891.

Upon this state of facts the sole question in the record is whether the title of the plaintiff company to the land in controversy acquired by the act of July 27, 1866, was divested by the forfeiture act of July 6, 1886. If it was, then the plaintiff at the commencement of the suit had no title, defendant's patent was valid, and he was entitled to verdict and judgment. If it was not, then defendant's patent was void, and should have been excluded; while plaintiff's title was good, and the district court should have directed a verdict in its favor and given judgment accordingly. The act of July 6, 1886, on its face undoubtedly purports to divest the title of the railroad company to the land, and restore it to the public domain. It does not provide for any subsequent proceedings of any kind to effect a forfeiture, nor is it simply a declaration by Congress of the intention of the United States to treat the grant as forfeited for failure to perform the conditions. It declares the lands forfeited absolutely, and restored to the public domain, and the executive branch of the Government has dealt with the lands as being the property of the United States. Therefore it is not a question of the construction of the act, but of its validity. If the act, for the purposes it professes to accomplish, is within the constitutional powers of Congress, then it operated to divest the title of the plaintiff, and the judgment of the dis-
501 trict court must be affirmed. If not, the plaintiff's title is good, and the judgment of the court below was erroneous. This is the only question in the case. This question, although thus reduced to a simple form, is the most serious that a court can be called upon to decide. The power to declare void an act of the highest legislative body of the Government is an extraordinary one, and it is well settled that such power is only to be exercised where it is perfectly clear and free from doubt that the act in question is beyond the powers conferred on Congress by the Constitution, or is within its prohibitions. The respect due to the legislative branch of the Government requires that its acts should not be questioned except for the strongest and clearest reasons; and, on the other hand, private rights, which are guarantied by the Constitution, are equally entitled to respect, and when it is plain that they have been infringed, courts should not hesitate to protect them. Whatever conclusion is reached, it should only be after grave consideration, with full sense of the responsibility which a decision of the question involves. This we have endeavored to give it.

As to the title acquired by the plaintiff under the original granting act of 1866, without reference to subsequent legislation, there will be no necessity for extended discussion. The language of the act in section 3 is: "That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company," etc., "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty sections per mile, on each side of said railroad line," etc. This is the same language that has been used in various other congressional railroad grants, and it has been construed by the Supreme Court of the United States in a number of cases.

The effect of the granting clause is held to be to pass the legal title to the grantee, so that it attaches to the specific lands upon filing the plats of location, and relates back to the date of the act. Schulenberg *v.* Harriman, 21 Wall. 44, 60; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 741; Buttz *v.* Railroad Co., 119 U. S. 55, 66–73; Wright *v.* Roseberry, 121 U. S. 488, 496–509; St. Paul & P. R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 5; Salt Co. *v.* Tarpey, 142 U. S. 241, 245–250; Bardon *vs.* Northern Pac. R. R., 145 U. S. 535; U. S. *v.* Southern Pac. R. Co., 146 U. S., 593. The court has also passed upon this identical grant in the case of U. S. *v.* Southern Pac. R. Co., 146 U. S. 593, holding, in the light of its previous decisions, that the act of Congress made a grant *in præsenti*, and uses the following language: "Applying these well-settled rules in the cases at bar, there can be little difficulty in arriving at a conclusion. The grant to the Atlantic & Pacific was made in 1866; to the Southern Pacific in 1871. They were grants *in præsenti*. When maps of definite location were filed and approved, the grants severally took effect by relation as of the dates of the acts. The map of definite location of the Atlantic & Pacific Company's road along the lands in controversy was filed and approved on April 11, 1872. Then the specific tracts were designated, and to them the title of the Atlantic & Pacific attached as of July 27, 1866. If anything in the land laws of the United States can be considered as thoroughly settled by repeated decisions, it is this." That court also holds that the title of the grantee under such grants was superior to that under a United States patent issued for lands within the grant, so long as it was still in force; and that a patent, issued under such circumstances, is void, and may be attacked in a court of law. Wright *v.* Roseberry, 141 U. S. 488. It may be considered as settled on the authority of these decisions that the plaintiff's title under the grant of 1866 would be sufficient to enable him to recover in this action, unless it has been divested by the forfeiture act of 1886.

It is claimed by defendant in error that the act of July 6, 1886, operated in law to do just what it states on its face, viz., to forfeit the lands that had been granted by the act of 1866, and restores them to the public domain. His position is that the grant was a conditional one, and that upon breach of the conditions the United States had the right and power to forfeit the grant. His contention is fully elaborated in the brief of his counsel, where it is here recapitulated as follows: First. That the final clause of section 9 of the act of 1866 is in legal effect an express reservation of the right of Congress to declare a forfeiture. Second. That under the conditions stated in section 9, when the same were broken, even without any express reservation in the act of the right of the Government to declare a forfeiture, that Congress might, as a legal result of the broken conditions, declare such forfeiture. Third. That in the grant of lands by the United States, in order to preserve the right of forfeiture, it is no more necessary to expressly reserve such right upon non-performance of the condition in the act than it is at common law in a deed conveying lands with a condition subsequent to expressly re-

serve a right to enter on condition broken; but in both cases the right to do the act operating to make the forfeiture arising from non-performance effective results as a legal incident from the non-performance of the condition. Fourth. That, in the absence of any express reservation of the power to declare a forfeiture of the grant in question, the courts may maintain the right of Congress, upon breach of the condition, to declare a forfeiture on the ground of public
502 policy alone. Fifth. That the mortgage act of 1871 is only declarative of the common-law right to mortgage, and was enacted for the sole purpose of removing all doubt on that subject, to thereby aid the company to proceed with construction; and that it was not intended by said act to enlarge the rights of the company or to limit the power of Congress to declare the grant forfeited or to subordinate the interests of the Government in the lands to the rights of future mortgagees. Sixth. That persons holding mortgages on said land took only the title vested in the company at the date of the several mortgages, and subject to the right of the United States to declare the lands forfeited for non-performance of the conditions subsequent, except such lands as might be coterminous with construction. Seventh. That the rights of mortgagees cannot be considered in this action, as no interest under any mortgage is set up by the plaintiff, but only the interests acquired under the act of 1866. Eighth. That the case of Railway Co. *v.* Esquibel, 4 N. M., 337, is conclusive in this court against the plaintiff. Defendant's counsel further refer to the decision of this court in the case of Railway Co. *v.* Esquibel, 4 N. M., 337, upon a similar clause in the Texas Pacific act, as conclusive of the proposition that this clause was for the benefit of the Government, and not of the grantee, and that the railroad company cannot be heard to say that the forfeiture of the land grant is not a proper measure to secure the completion of the road.

The contention of plaintiff in error is briefly this: That the estate granted by the act of July 27, 1866, is one upon condition subsequent. That while, at common law, in the absence of any express provision on the subject, the right of the grantor to forfeit the estate for breach of condition undoubtedly exists, yet if the granting act, at the same time that it specifies the conditions, also declares what shall be the effect of a breach of them, such declaration of the consequences of a breach becomes as much a part of the condition as the act or omission itself. That the only conditions imposed by the granting act were: First, in the eighth section, that the railroad must be commenced within two years, prosecuted at the rate of at least fifty miles per year thereafter, and be finished by July 4, 1878; and, second, in the nineteenth section, that the company must obtain *bona fide* subscriptions to its stock to the amount of a million dollars within two years, with 10 per cent. paid in. That as to the second of these it was expressly provided that, if not done within the time fixed, the act shall be null and void. That the first condition—of construction within a fixed time—is the same that has been attached to all grants by Congress in aid of railroads or similar works, and that all such grants—being over thirty in num-

ber—with the exception of this and two others, have contained the further express condition that if the road or work should not be completed within the time fixed by the act the lands granted should revert to the United States. That after legislating in this sense since 1850, including nine other railroad grants made at the same session of Congress in 1866, Congress made a radical change in the corresponding condition as to the Atlantic & Pacific grant, by omitting the usual words providing for reversion or forfeiture of the lands to the United States in case of breach of the condition, and inserting in its place an express provision, specifying as a further condition on which the grant is made by the United States and accepted by the company that in case of the breach of the conditions continuing for a year "the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." That by this change from legislative expression, sanctioned by long and continuous use in acts upon the same subject, to one entirely different, Congress intended that the rights and liabilities of the parties should likewise be different in respect to the matters thus changed. That by expressly omitting the customary provision for reversion of the lands to the United States, and providing something else as the consequence of a breach of condition, Congress excluded the idea of forfeiture, and limited the effect of a breach to the one specified. That the specification of the consequence mentioned necessarily implies that the general power of forfeiture was not intended to be reserved, because, if the latter existed, it would include all other powers with reference to the lands, and a reservation of lesser powers, necessarily so included, would be unnecessary. That by excluding, in contradiction to its previously established policy on this subject, the provision for reversion, and specifying something else, it became a part of the condition that the effect of the breach should be limited to the one so specified, and all other conditions must be read with this one attached. That by the ninth section the United States renounced any right it might otherwise have had to forfeit the grant, except it should be in furtherance of the completion of the road; and that to come within this reservation the act of forfeiture must be for that declared purpose, whereas the forfeiture act of 1886 is by its title avowedly for the purpose of opening the lands to settlement, and not in connection with any plan or proposal for completion of the road. Plaintiff in error also contends, and has introduced a large amount of evidence in an effort to show it, that the Government, by failing to extinguish the Indian titles, and to survey the lands as earned by construction, and by locating new Indian reservations upon the line of the road and within its grant limits since the definite location of the line, is primarily responsible for the de-
503 lay in construction, and that the performance of the conditions on part of the company cannot be strictly required, or a breach declared for non-performance, until the Government has performed its own undertaking. We shall not attempt a review of this evidence, nor to determine whether the facts alleged on the point are or are not proven; nor whether, if proven, they

can be availed of by the plaintiff in error to shield it from forfeiture of its land grant. In view of the conclusion at which we have arrived, it is not necessary to do so.

If these were the only questions in the case, the decision, so far as this court is concerned, might not be difficult. While there is much force in the argument for plaintiff in error that by the eighth and ninth sections of the act of 1866 the general power of forfeiture by the grantor was waived, and the remedy for breach of condition limited to that stated in the last clause of section 9, nevertheless, as the same language has been heretofore construed by this court in the Texas Pacific act, we should be disposed to follow the decision in Railway Co. *v.* Esquibel, *supra*, and hold that the railroad company, in default as to the completion of the road, could not be heard to say that forfeiture is not an act deemed needful by the United States to insure the completion of the road. But counsel for plaintiff in error further contends that the act of 1871, authorizing the company to mortgage its road, franchises, and land grant, passed after the company was already in default as to construction at the yearly rate required by the granting act, not only negatived any intention of Congress by the act of 1866 to forfeit the grant for nonperformance of the condition, but was such an alteration of the original contract as to introduce new conditions, whereby the United States has postponed its right to take any steps under section 9, until a time that has not yet arrived. His argument, more fully developed orally than in the brief, is that, while the power to mortgage the lands existed without express authorization, yet a mortgage so executed would only create a lien on the lands, burdened with the condition that upon failure of the company to build 50 miles per year, or to complete the road by July 4, 1878, the Government might take measures towards insuring its completion. What those measures might be could not be certainly told beforehand. The line on which the road was required to be built was to a great extent through an Indian country, in a part of which in 1871, and for some years afterwards, the Indians were in a state of active hostility. Much of the country was also of doubtful value, either for local business or for selling lands. But the Government wanted to get this road built by private capital, without the aid or security of Government money or credit, such as had been given to the Union and Central Pacific roads. It was useless to ask private investors to put their money into bonds secured by mortgage on lands and franchises as to which, if not completed by 1878, the Government would have the right to take steps of unknown character towards its completion. Nobody would take such a risk. To say nothing of the extinguishment of Indian titles, which was contemplated by the act, there was no assurance that the hostile Indians would be subdued, so as to allow construction to go on within the time fixed which in fact was not done as to the Comanches for four or five years after 1871. Therefore, in order to offer a security which the public could afford to accept, and at the same time to reserve protection to the Government in the ultimate application of the lands to construction and completion of the road, Congress, by the mort-

gage act, altered the condition as to time of construction, so that, instead of July 4, 1878, the time for construction as to the road mortgaged was extended to the date of the foreclosure of the mortgage, and the rights of mortgagees under such mortgage should only extend to lands coterminous with the road constructed at that date. Hence, as to the lands covered by any mortgage executed pursuant to this act, there is no breach of condition as to time of construction until the date of foreclosure; and the United States, by the terms of the act of 1866, as altered by the act of 1871, has agreed that as to lands so mortgaged it will take no steps under section 9, except as to lands which may be found opposite road unconstructed when the mortgage is, or by its terms can be and ought to be, foreclosed. That for this reason, as to lands so mortgaged, there has been no breach of conditions, and the right of the United States to take steps of its own to complete the road has not yet attached. That the right and duty of the company, or, on its default, of the mortgagees, to go on with the construction, still continues. That the estate created by the act of 1866 remains in the company, subject to the rights of the mortgagees, and in case of ultimate default of both, subject to the right of the Government; and that in the meantime it is the right of the company, for the preservation of the security of its mortgages, to maintain the possession which follows the legal title.

We have given to this contention, as well as the answer to it by defendant's counsel, and the argument of the committees of Congress on the effect of this mortgage act, our most earnest consideration, with a view to ascertain its true meaning and legal effect, and the rights of the parties that grow out of it. In the first place, it is quite clear that it introduces a new feature, which was not in the case of Railway Co. *v.* Esquibel, and that with this mortgage act before us the decision of that case furnishes no guide to a solution of the question now presented. Nor have we been referred to any case in which such a clause has been directly construed.

504 The act of April 20, 1871, has been already quoted in full, but we give again the proviso on which the question turns: "Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." If this were part of a deed between private individuals, we do not think there would be any controversy as to its meaning. It seems to be insisted that because these words are found in an act of Congress they must be construed in some way so as to deprive them of their usual signification, and introduce some meaning different from that expressed by the words themselves. We understand that the rule of construction of public grants is different from that of private grants, in this: That the latter are to be construed most strongly against the grantor, and the former most strongly against the grantee; but this only applies

to cases where the language is doubtful or ambiguous. It does not go to the extent of changing the clear meaning of words in either case. It will not, by mere intendment, supply words to confer rights, powers, or property upon the grantee of a private deed, nor strike out words of clear and obvious meaning, in order to withhold these from the grantee of a public grant. Where the language is plain, and free from ambiguity, there is no necessity for interpretation, because the words speak for themselves. The Supreme Court of the United States has laid down the rule for the construction of grants of this character so plainly that there can be no difficulty in understanding and following it. In Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 740, having under consideration a railroad grant to the State of Kansas, the court said: "This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the meaning and intent expressed in it. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The construction must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act; but if they admit of different meanings, the one of extension and the one of limitation, they must be accepted in the sense most favorable to the grantor." Counsel for defendant in error say "that the mortgage act of 1871 is only declaratory of the common-law right to mortgage, and was enacted for the sole purpose of removing all doubt on that subject, to thereby aid the company to proceed with construction; and it was not intended by said act to enlarge the rights of the company, or limit the power of Congress to declare the grant forfeited, or to subordinate the interests of the Government in the lands to the rights of future mortgagees." We do not perceive how this can be the case unless the words, "at the time of foreclosure of said mortgage," at the conclusion of the mortgage act, are stricken out, and in their place inserted, "at the time of the breach of condition," or something equivalent to them. By no conceivable process of reasoning can it be made out that the two phrases above quoted mean the same thing. Nor can we see, if the latter meaning were given to the proviso, what was the occasion for the passage of the mortgage act at all. The company had already a common-law right to mortgage whatever title it had, and the mortgagee would take his lien subject to whatever conditions and resulting penalties attached under the original act of 1866. If the act of 1871 did not offer to mortgagees something more than they could get without it, there was certainly neither sense nor reason in its passage. If it was not the purpose of the act to extend the time for completion as to road coterminous with the mortgaged lands, then why was anything said about date of foreclosure. If the intention of Congress was only to give the mortgagees a lien subject to the breach of conditions as already specified in the act of 1866, how is it possible to explain the omission of the plain, direct, and easy words to express that intention, and the insertion of other

words which bear no possible relation to it, or under certain contingencies would be absolutely inconsistent with it? The words used are not obscure. They have a well-understood meaning, both technically and in common use. If used in an ordinary conveyance or transaction, nobody would hesitate for a moment to say what they mean. They are, both by themselves and in connection with the subject-matter and context, plain and unambiguous. This fact, together with the entire absence of reason or purpose in the act which would follow from giving it the forced and unnatural construction contended for, leads us to conclude that the proviso means simply what it says, and that it was intended and does operate to enlarge the condition of the grant as to the mortgaged lands. We do not see that it made any change as to the effect of a breach of the conditions of the grant. What the United States might or could do in the way of steps towards the completion of the road in case of a breach and continuance thereof for a year remained as uncertain as before, but it nevertheless remained. But whatever this right or power was, the mortgage act amounted to a declaration by the United States to prospective mortgagees having all
505 the force of a contract, that the company, or they for it, should have until date of the foreclosure to complete the road before such power could be exercised. The word "only," in ordinary use, is a term of restriction, and not of extension; and its use in this proviso seems to imply that under an express general power to mortgage the rights and lien of the mortgagees might have been even more extensive if it had not been limited in this way to the time of foreclosure. From these considerations, it is our opinion that the act of April 20, 1871, together with the act of 1866, as altered or amended by it, constituted a contract, under which the mortgagees acquired vested rights in the lands covered by their mortgages to have them preserved as to title and possession for their ultimate security to the extent they may be found applicable on account of construction at the date of foreclosure of the mortgages; and that any legislation which withdraws from them the security of the lands, devotes them to other purposes, and turns over their possession to hostile hands, is destructive of those rights. Said Mr. Justice Strong, in the Sinking-fund cases, 99 U. S. 727: "There is no technicality about vested rights. Most of them grow out of contracts; and, no matter how they arise, they are equally sacred, equally beyond the reach of legislative interference." Mr. Justice Field, in the same case, said: "Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and, if that be effected by direct legislative action operating on the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated." And Mr. Justice Bradley, in the same case, to a similar purport, said: "A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by

arbitrary legislative action is to do it without due process of law." Is such legislation, which thus impairs or destroys vested rights, valid or effectual, and should it be upheld by the courts? The Supreme Court of the United States, in the Sinking-fund cases, above cited, which arose upon the grant in aid of the Union and Central Pacific railroads, has answered the question in the negative, saying: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case" "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. * * * The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." This authority from the highest court in the Government is conclusive, and there is no necessity for further citations on this proposition.

The act of July 6, 1886, is upon its face an absolute legislative forfeiture. It cannot be said to be a measure designed in any way to promote the construction or completion of the road. Its declared purpose is to "forfeit the lands granted to the Atlantic & Pacific Railroad Company, * * * and to restore the same to settlement." It contains no suggestion of any intention to devote the lands to the completion of the road in some other way, or by some other agency, such as granting them to another company that would finish the road, or setting apart the proceeds of their sale as a fund or subsidy therefor. Nor, though seven years have elapsed since its passage, has any step in that direction been taken. The act contains no provision for the protection, preservation, or reservation of the vested rights of the mortgagees, nor makes the disposition of the lands subject to these rights. By opening the lands to settlement it is evident that Congress entirely ignored the rights of the mortgagees to any of the land, or any interest or security therein; since in no way could the Government more completely take the lands away from the reach of the mortgagee than by disposing of them to others under a United States patent, as in this case. If our contention as to the rights of the mortgagees and of the company for their benefit is correct, then they constitute property which cannot be thus taken away by legislative act. The forfeiture cannot be justified under the power of repeal contained in section 20 of the

act of 1866. The power of alteration, amendment, or repeal reserved by that section was by the same section expressly declared to be "with due regard for the rights of the Atlantic & Pacific Railroad Company," and, furthermore, such power was reserved, in the language of that section, "the better to accomplish the object of this act, namely, to promote the public interest and welfare by
506 & 507 the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes." A forfeiture of the lands, however strong the reasons therefor which restores them to settlement, cannot be held to fall within any of the purposes of this section; and, whatever its intention, the power of alteration or repeal is by its own terms, and would be anyhow, subject to the rights which have become vested under the granting act and the mortgage act.

The question is a very extensive one, and we might discuss the arguments presented on both sides at greater length, but, as the conclusion at which we have arrived is decisive of the case with us, we do not think it necessary to prolong this opinion. It is our opinion that the act of July 27, 1866, was a grant *in præsenti* to the Atlantic & Pacific Railroad Company of the odd-numbered sections within 40 miles on each side of the line when located; that upon filing plats of definite location, March 12, 1872, the grant became definite, and attached to specific lands, and the legal title passed to the grantee by relation as of the date of the act, with a condition subsequent attached that, if the company failed to complete the road by July 4, 1878, the United States might do such acts as it might deem needful to insure the speedy completion of the road; that by the act of 1871 the company was authorized to mortgage the land so granted to it, and as to lands so mortgaged the condition of completion was enlarged until the time of foreclosure of such mortgage, and the estate created by the granting act in such lands could not be divested by any act or means until that time; that the act of July 6, 1886, did not operate to divest the estate as to such lands vested in the mortgagees, and can only be construed as a declaration of the intention of the Government to resume the granted lands at such time and by such means as it lawfully can by some due process of law, which has not yet been provided. As the land in controversy falls within the above category, it follows that the plaintiff's title must prevail, and the judgment of the district court should be reversed.

WM. D. LEE, *A. J.*
EDWARD P. SEEDS, *A. J.*

508 In the Supreme Court of the United States.

THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
ROBERT MINGUS, Defendant in Error.

Error to the Supreme Court of the Territory of New Mexico.

Now, on this 20th day of February, A. D. 1894, comes the said The Atlantic and Pacific Railroad Company, by Frank Springer, its attorney, and Britton and Gray, of counsel, and says that in the record and proceedings in the cause lately pending in the supreme court of the Territory of New Mexico, wherein the said The Atlantic and Pacific Railroad Company was plaintiff in error and the said Robert Mingus was defendant in error, there is manifest error in this, to wit:

I.

That the said supreme court, by its judgment in said cause, affirmed the judgment of the district court for the fourth judicial district of the Territory of New Mexico, sitting in and for the county of San Miguel, whereas the judgment of the said district court was erroneous in this, to wit:

First. In admitting in evidence upon the trial of said cause, over plaintiff's objection, the patent of the United States to Albert W. Bray, dated the tenth day of December, A. D. 1891, conveying the land in controversy in this suit, and also the deed from Albert W. Bray to Ezra E. Griffith, dated March fifteenth, 1892, and from Ezra E. Griffith to Robert Mingus, executed March twenty-fourth, 1892, conveying the same land.

Second. In admitting in evidence upon the trial of said cause the act of Congress of July sixth, 1886, over plaintiff's objection.

509 Third. In denying plaintiff's motion to direct the jury to find for the plaintiff.

Fourth. In refusing to give to the jury each of the several instructions requested by plaintiff in the words following, to wit:

1. "The court instructs the jury that upon the undisputed facts of this case the law is with the plaintiff, and it is entitled to recover the possession of the premises described in the declaration. The jury are therefore directed to find a verdict of guilty.

2. If the jury believe from the evidence that the failure of the Atlantic & Pacific Railroad Company to construct its railroad pursuant to the act of Congress incorporating said company to a point opposite the lands in controversy was due to the failure of the Government of the United States to perform its own obligations under said act, then the Government had no right to forfeit the grant, and the act of Congress of July, 1886, is to that extent unconstitutional and void, and the jury, if they so believe, will find the defendant guilty.

3. By an act of Congress approved April twentieth, 1871, entitled 'An act to enable the Atlantic & Pacific Railroad Company to mortgage its road,' it was enacted as follows: That the Atlantic & Pacific Railroad Company, organized under act of Congress of July

27th, 1866, is hereby authorized to make and issue its bonds in such form and manner and for such sums, payable at such times and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable, and to secure said bonds the company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior, provided that if the company shall hereafter suffer any breach of the conditions of the act above referred to under which it is organized the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

Plaintiff has introduced sufficient proof of the due execution of certain mortgages securing bonds issued under authority of said act of Congress covering the lands granted to it within the Territory of New Mexico, and, among other, the land in controversy. You are instructed that by this act the United States subordinated whatever right it had to forfeit the said grant to the rights of the holders of bonds under such mortgages until foreclosure, and that until foreclosure thereof it was the right and duty of the company to hold, possess, and preserve said lands for the ultimate security of such persons claiming under the mortgages.

If the jury believe from the evidence that the said mortgages covering the land in question have not been foreclosed, and that the bonds secured thereby are not yet due, either by their terms or by any default of the company whereby they might become due, then the act of July 6th, 1886, to forfeit said grant is void as to such lands, and the jury will find the defendant guilty.

510 Fifth. In giving to the jury the instruction to find a verdict of not guilty in the words following, to wit:

"GENTLEMEN OF THE JURY: This is an action of ejectment brought by the plaintiff to recover possession of the premises described in the declaration. There is no dispute as to the material facts, and the only question is whether, admitting the truth of all the facts sought to be proven, the plaintiff is entitled to recover. This is purely a question of law and is for the court to decide.

"The plaintiff, The Atlantic & Pacific Railroad Company, was incorporated by act of Congress of July 27th, 1866, for the purpose of building a line of railroad to the Pacific ocean. To aid in this work Congress, by the same act, granted to this company the alternate sections of land within a certain distance of its located line, upon condition, among other things, that it should complete its road within a certain time. The company only completed a part of its road within the prescribed time and failed as to the remainder. On July 6th, 1866, Congress passed an act declaring the unearned

portion of the grant forfeited—that is to say, so much of the grant as was opposite unconstructed road. The land in controversy is situated within the original limits of the grant, but also within the part thus declared forfeited by Congress and restored to the public domain. It was afterwards patented by the United States upon an entry, and upon this patent and deeds thereunder defendant relies for his defense, while the plaintiff insists that the patent is void and conveys no title, because the act of forfeiture was unconstitutional and void.

"This is the sole question in the case, and I hold that the defendant has by his patent and title deeds thereunder made out a good defense to plaintiff's claim, and that plaintiff cannot recover. I therefore direct you to find the defendant not guilty. I hand you a form of verdict which you will have your foreman sign and return into court as your verdict."

Sixth. In denying plaintiff's motion for a new trial.

II.

That the said supreme court, as by its opinion appears, held and decided that the act of Congress entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company," approved July 6, 1886, was valid and effectual to divest the title of plaintiff in error to the lands in controversy in this action acquired by virtue of the act of Congress approved July 27, 1866, incorporating the Atlantic and Pacific Railroad Company, and the act of Congress entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871.

Wherefore, for the above and many other manifest errors
511 in the said record appearing on the face thereof, plaintiff prays that the said judgment of said supreme court of the Territory of New Mexico in said cause be reversed and held for naught, and that said court be ordered to enter a judgment reversing said judgment of said district court.

FRANK SPRINGER,
Attorney for Plaintiff in Error.

BRITTON AND GRAY, *Of Counsel.*

512 And afterwards, to wit, on the 23rd day of March, 1894, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation directed to the said Robert Mingus; which said citation is in the words and figures following, to wit:

The United States of America to Robert Mingus, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, holden at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Atlantic and Pacific Railroad Company is

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to all parties in that behalf.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, this 21st day of February, 1894.

THOMAS SMITH,
Chief Justice of the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Lorenzo Lopez, sheriff of the county of San Miguel, do hereby certify that on this the 21st day of March, A. D. 1894, I served the within citation by delivering a true copy thereof to the said defendant, Robert Mingus, in person, at, to wit, the county of San Miguel, Territory of New Mexico.

LORENZO LOPEZ,
Sheriff of San Miguel County, New Mexico,
By ENRIQUE ARMIJO, *Deputy.*

513 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Atlantic and Pacific Railroad Company, plaintiff in error, and Robert Mingus, defendant in error, a manifest error hath happened, as it is said, to the great damage of the said plaintiff in error, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within sixty days from the date hereof, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twentieth day of February, A. D. 1894.

[Seal Supreme Court, Territory of New Mexico.]

H. S. CLANCY,
Clerk of the Supreme Court of the Territory of New Mexico.

I hereby make return to the above writ by annexing thereto an authenticated transcript of the record, citation to the adverse party, and the opinions filed in said cause under my hand and the seal of said supreme court.

H. S. CLANCY, *Clerk.*

514 UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, H. S. Clancy, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinions filed in the cause herein mentioned, as the same now appears remaining in my office.

Seal Supreme Court, Territory of New Mexico.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this 24th day of March, 1894.

H. S. CLANCY, *Clerk.*

Endorsed on cover: Case No. 15,578. New Mexico Territory supreme court. Term No., 100. The Atlantic and Pacific Railroad Company, plaintiff in error, *vs.* Robert Mingus. Filed April 18th, 1894.

165-413

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ATLANTIC & PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
ROBERT MINGUS.

No. 100

In Error to the Supreme Court of the Territory of New Mexico.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT.

This is an action of ejectment brought by the Atlantic and Pacific Railroad Company (hereinafter styled "Railroad Company") against Robert Mingus, to recover possession of N. ½ N.W. ¼ and N.W. ¼ N.E. ¼ of Section 5, Tp. 7 N., R. 26 E., in San Miguel County, New Mexico.

The facts are undisputed. The plaintiff in error claims title and right of possession by virtue of a grant from the United States made by an Act of Congress approved July

27, 1866 (14 Stats. 292, Rec. 6), and alleges that the land being an odd-numbered section of public lands within the primary limits of the grant and being vacant and in all respects subject to the grant, both at the date thereof and at the date of the definite location (March 12, 1872), passed to and became vested in the Company at said date of definite location.

Defendant claims under a patent for the same land issued by the United States on December 10, 1891, to one Albert W. Bray (Rec. 318), and founded upon a pre-emption filing made January 9, 1888. Whilst conceding the original vesting of title in the Railroad Company on March 12, 1872, and its undisturbed continuance until July 6, 1886, defendant maintains that an Act of Congress approved July 6, 1886 (24 Stats., p. 123, Rec. 323), having declared a forfeiture of the grant of 1866, the title of the Railroad Company was then annulled, became reinvested in the United States as public land, and was thereafter rightfully subject to his pre-emption claim and patent.

Plaintiff in error denies the validity of said alleged Act of forfeiture, and contends that it was ineffectual to annul its previously vested title, and that hence the patent of defendant was issued without authority, and is void upon its face.

The case then turns wholly upon the validity and effect of the Act of forfeiture, approved July 6, 1886, and the undisputed record facts applicable thereto are as follows:

1. Section 1 of the Act of July 27, 1866, incorporated the Company and authorized it to locate, construct, maintain, and enjoy a railroad upon a generally designated route between named terminal points.

Section 3 provides:

"That there be and is hereby granted to the Atlantic " and Pacific Railroad Company, its successors and assigns, " for the purpose of aiding in the construction of said " railroad and telegraph line to the Pacific coast, and to " secure the safe and speedy transportation of the mails, " troops, munitions of war, and public stores, over the " route of said line of railway and its branches, every alter- " nate section of public land, not mineral, designated by " odd numbers, to the amount of twenty alternate sections " per mile, on each side of said railroad line, as said Com- " pany may adopt, through the Territories of the United " States."

2. Section 11 recites the consideration to the United States for said grant by providing—

"That said Atlantic and Pacific Railroad, or any part " thereof, shall be a post route and military road, subject " to the use of the United States for postal, military, naval, " and all other Government service, and also subject to " such regulations as Congress may impose restricting the " charges for such Government transportation."

3. To make this land grant available to secure not only the construction but also to secure its subsequent operation, it was agreed upon part of the United States in—

SECTION 2. "* * * The United States shall extin- " guish, as rapidly as may be consistent with public policy " and the welfare of the Indians, and only by their volun- " tary cession, the Indian title to all lands falling under " the operation of this Act and acquired in the donation " to the road named in the Act."

It is in evidence and is not disputed that the United States have not only failed to extinguish the Indian title to lands along the prescribed route of the road, but have, since the date of the grant and of definite location, further encumbered the grant by the creation of additional Indian

reservations carved out of the granted lands. (Rec. 302, 303.)

It was also agreed in Section 6—

"That the President of the United States shall cause "the lands to be surveyed for forty miles in width on both "sides of the entire line of said road after the general "route shall be fixed, and as fast as may be required "by the construction of said railroad, and the odd sec- "tions of land hereby granted shall not be liable to sale "or entry or pre-emption, before or after they are sur- "veyed, except by said company, as provided in this "Act."

It is in evidence and is not disputed that the United States have largely failed to thus survey the lands, although repeatedly urged and requested so to do by the Railroad Company. (Rec. 286, 287, 304.)

4. To secure to the United States the application of this land grant to the prescribed construction of the road, Sections 8, 9, and 20 provided:

SEC. 8. "That each and every grant, right, and privi- "lege herein are so made and given to and accepted by "said Atlantic and Pacific Railroad Company upon and "subject to the following conditions, namely: That the "said Company shall commence the work on said road "within two years from the approval of this Act by the "President, and shall complete not less than fifty miles "per year after the second year, and shall construct, "equip, furnish, and complete the main line of the whole "road by the 4th day of July, anno Domini eighteen "hundred and seventy-eight."

SEC. 9. "That the United States make the several con- "ditional grants herein, and that the said Atlantic and "Pacific Railroad Company accept the same, upon the "further condition that if the said Company make any "breach of the conditions hereof, and allow the same to "continue for upwards of one year, then, in such case, at

" any time hereafter, the United States *may do any and* " *all acts and things, which may be needful and necessary* " *to insure a speedy completion of the said road.*"

SEC. 20 provides—

" That the better to accomplish the object of this Act, " namely, to promote the public interest and welfare by " the construction of said railroad and telegraph line and " keeping the same in working order, and to secure to " the Government at all times, but particularly in time of " war, the use and benefits of the same for postal, mili- " tary, and other purposes, Congress may, at any time, " having due regard for the rights of said Atlantic and " Pacific Railroad Company, add to, alter, amend, or re- " peal this Act."

5. Up to April 20, 1871, the Company had only been able to construct seventy-five miles of road, extending westward from its initial point at Springfield, Missouri. Along that construction in the State of Missouri, there was but little unappropriated public land available under the grant to aid in building the road. (Rec. 297.) From the west line of Missouri to the west line of the Indian Territory (about 350 miles), the lands were unsurveyed and were wholly embraced in Indian titles, which the United States had not extinguished, and no part of those lands were available to aid in construction. (Rec. 297, 298.) From thence through New Mexico and Arizona to the Colorado River, the prescribed route of the road ran through numerous reservations, occupied by hostile and warlike Indians, the boundaries of which reservations were subsequently enlarged by the United States, and new reservations were created. Most of the lands which were not included in such unextinguished Indian occupancy were then unsurveyed, and were largely taken up by unadjusted Mexican land claims. (Rec. 298.) In addition

the surveying and engineering parties of the Company were stopped by orders from the Secretary of the Interior from continuing construction westward through the Indian Territory, and the prosecution of work thereon was not permitted until March, 1871, and then only upon the Company giving bond of five hundred thousand dollars to protect the Indian tribes through whose territory the line of the road was required by the Act of Congress to pass. (Rec. 298.)

Furthermore, the Act of 1866, *supra*, conferred no express authority upon the Company to mortgage its land grant in advance of construction so as to secure in that way capital for the prosecution of the work.

For these various reasons the Company was compelled to stop and to appeal to Congress to do those things to make the land grant available which the Government had promised in the Act of 1866. On April 20, 1871, having all the facts before it and the grant being then clearly subject to whatever reserved right the United States had, if any there was, for conditions broken pursuant to Sections 8, 9, and 20, *supra*, Congress (17 Stats., p. 19) granted authority to mortgage "its road, equipment, lands, franchises, "privileges, and other rights and property, subject to "such terms, conditions, and limitations as its directors "may prescribe."

This authority was coupled with the following proviso, namely:

"That if the Company shall hereafter suffer any breach "of the conditions of the Act above referred to, under "which it is organized, the rights of those claiming under "any mortgage made by the Company to the lands "granted to it by said Act, shall extend only to so much "thereof as shall be coterminous with or appertain to "that part of said road, *which shall have been con-*"*structed at the time of the foreclosure of the mortgage.*"

6. Under authority of this act the Company executed mortgages to the aggregate amount of $31,500,000, of which $3,590,629 were secured by mortgages upon the Central Division of the road, extending from the west line of Missouri to Albuquerque and embracing the land here in controversy. (Rec. 112, 113.) These mortgages were duly executed and recorded in the Interior Department as required by the Act of Congress. The bonds secured by them were sold, and the moneys realized therefrom were applied to the construction of the road. According to the record they are still outstanding upon said Central Division, and not due; the interest on them has been duly paid; they have not been foreclosed; and no default has occurred on account of which they could be foreclosed.

7. There have been since constructed and equipped sixty-two additional miles in the Indian Territory, at which point further construction was compulsorily suspended because of the condition of the existing Indian titles and occupancy. In 1880 the constructed line of the Atchison, Topeka and Santa Fe Railroad Company, crossing down through Kansas and Colorado en route to the Mexican border, reached the designated line of the Atlantic and Pacific at or near Albuquerque, in New Mexico, and it then became for the first time practicable to build thence westward to the Pacific Ocean, and thus avoid many of the obstacles and hindrances encountered in the Indian Territory. (Rec. 298.) There were then constructed and equipped, at a cost of $16,000,000, about 560 miles from at or near Albuquerque to the Needles, at the eastern line of California. (Rec. 299.) Furthermore, by contract of purchase at the price of about $7,290,000, 243 miles of road, on the exact line of its definite location, were acquired extending from the eastern boundary of California

through the Mojave desert to Mojave in California; and thence, by a trackage contract with the Southern Pacific, the Atlantic and Pacific has the right to run its own cars to San Francisco, and to conduct to that point an independent and competitive freight and passenger business. The Company has thus about 1,228 miles of constructed road, fully equipped and in active operation; and by its trackage arrangements with the Atchison, Topeka and Santa Fe from Albuquerque eastward, and with the Southern Pacific from Mojave westward, it makes a through transcontinental route, over which the United States exercises the privileges and authority prescribed in Section 11 of the Act of 1866. The part of the road between the point where, westward, construction in the Indian Territory stopped and Albuquerque, about 475 miles, and embracing the land here in controversy, has not been constructed. (Rec. 299, 300.)

8. Upon this state of facts, on July 6, 1886, the following Act of Congress was approved (24 Stats., p. 123, Rec. 323):

"That all the lands, excepting the right of way, and the "right, power, and authority given to said corporation to "take from the public lands adjacent to the line of said "road material of earth, stone, timber, and so forth, for "the construction thereof, including all necessary grounds "for station buildings, work shops, depots, machine shops, "switches, side tracks, turn tables, and water stations, "heretofore granted to the Atlantic and Pacific Railroad "Company, by an Act entitled 'An Act granting lands to "'aid in the construction of a railroad and telegraph line "'from the States of Missouri and Arkansas to the Pa-"'cific coast,' approved July twenty-seventh, eighteen "hundred and sixty-six, and subsequent acts and joint "resolutions of Congress, which are adjacent to and co-"terminous with the uncompleted portions of the main "line of said road, embraced within both the granted and

" indemnity limits, as contemplated to be constructed " under and by the provisions of the said Act of July " twenty-seventh, eighteen hundred and sixty-six, and " Acts and joint resolutions subsequent thereto and relat- " ing to the construction of said road and telegraph be, " and the same are hereby, declared forfeited and restored " to the public domain."

9. The land here in controversy is part of an odd-numbered section, not mineral, situate within the primary limits of the grant of 1866, as identified by the map of definite location filed March 12, 1872. (Rec. 31.) It was not within any of the exceptions or reservations from the grant, but was in all respects subject thereto. It was at date of the grant wholly vacant and free from adverse claim. It so remained vacant until January 9, 1888, when Albert W. Bray filed his pre-emption declaratory statement therefor and made final proof and payment on March 10, 1891; patent in the name of said Bray was issued December 10, 1891, and the title passed by warranty deeds from Bray to Ezra E. Griffith, and from him to Robert Mingus, the defendant in error. (Rec. 318–321.)

10. The declaration in ejectment of plaintiffs in error against said Mingus was filed on March, 28, 1892, in the District Court for the Fourth Judicial District, in and for the County of San Miguel, New Mexico. (Rec. 1.) Upon the verdict of the jury judgment was entered in favor of defendant, which judgment was affirmed by a divided court of the Supreme Court of New Mexico. (Rec. 352, 353, 362.) Thence the case comes by writ of error here.

ARGUMENT.

When the grant was, on March 12, 1872, identified by the filing and acceptance of the map of definite location,

the legal title to the land in controversy vested in the Railroad Company as of the date of the grant, and unless thereafter divested by voluntary relinquishment, or by due process of law, the Railroad Company and its assigns have the continuing right of possession against all subsequent claimants or patentees. In United States *v.* Southern Pacific R.R. Co., 146 U. S., pp. 594, 595, this Court determined the question of the vesting of legal title, as to this identical grant, and dealing with the date of its definite location in California, said:

"They were grants *in præsenti*. When maps of definite "location were filed and approved, the grants severally "took effect by relation as of the dates of the Acts. The "map of definite location of the Atlantic and Pacific "Company's road along the lands in controversy was filed "and approved on April 11, 1872. Then the specific "tracts were designated, and to them the title of the At-"lantic and Pacific attached as of July 27, 1866. If any-"thing in the land laws of the United States is to be "considered as thoroughly settled by repeated decisions, "it is this."

And in Deseret Salt Company *v.* Tarpey, 142 U. S. 241, this Court decided that upon such legal title a railroad grantee could maintain an action of ejectment before the issue of a patent.

And in Wright *v.* Rosebury, 121 U. S. 488, this Court further held:

"The doctrine that all presumptions are to be indulged "in support of proceedings upon which a patent is issued, "and that it is not open to collateral attack in an action "of ejectment, has no application where it is shown that "the land in controversy had, before the initiation of the "proceedings upon which the patent was issued, passed "from the United States. The previous transfer is a fact "that may be established in an action at law, as well as

" in a suit in equity. Indeed it may be said to be com-
" mon knowledge that patents of the United States for
" lands which they had previously granted, reserved from
" sale, or appropriated, are void."

These decisions state the law as reiterated by this Court in numerous other opinions, too familiar to require citation. It may, therefore, be safely assumed as settled law that, inasmuch as the land in controversy was part of an odd-numbered section, not mineral, situate within the primary limits of the grant and along the line of definite location filed and approved March 12, 1872, and not included within any of the exceptions from the grant, but in all respects subject thereto, the legal title of the Railroad Company attached and the right of possession continued perfect as against a subsequent patentee under the United States, *unless such legal title has been divested by voluntary relinquishment or by due process of law.*

There is no pretence of voluntary relinquishment, but the Court below has decided that the legal title vested in the Railroad Company, subject to a reserved right in the United States to enforce a legislative forfeiture of the grant, upon failure to construct within a prescribed time; that there was a breach of such condition subsequent; and that the Act of July 6, 1886, *supra*, lawfully declared forfeiture and, by mere force of the statute, reinvested the legal title in the United States.

In support of our contention as to the incorrectness of this decision, and as to the unconstitutionality and invalidity of the Act of July 6, 1886, the argument naturally invites a careful examination of the following propositions:

1st. What were the conditions subsequent of the grant of July 27, 1866?

2d. Was not said grant a legislative contract equally binding upon both parties thereto, and, if default upon part of the Railroad Company occurred or was compelled, through failure of the United States to perform its contract obligations, could the United States enforce such conditions subsequent?

3d. Were not the rights reserved to the United States by the Act of July 27, 1866, subordinated to the rights acquired by the subsequent Act of April 20, 1871?

4th. Can the legal title once vested under the Act of July 27, 1866, be divested by a mere legislative declaration, containing no provision for any Judicial enquiry into the facts upon which it is provided and extending to the grantee no opportunity of urging any equitable or other considerations by reason of which the breach of condition might be excused, or the condition itself discharged?

I.

WHAT WERE THE CONDITIONS SUBSEQUENT OF THE GRANT OF JULY 27, 1866?

The Court below has assumed that the same right of absolute forfeiture which, in other land grants by Con-

gress was expressly reserved to the United States, was equally reserved in this grant by necessary implication. The theory seems to be to read the terms of this statute, no matter how different in expression or intent, as in *pari materia* with other though wholly variant grants.

But suppose that there had been no conditions subsequent—no reservation of rights to the Government—but simply a grant without conditions? In such case there could be no invoking of the analogy of other grants, based upon conditions subsequent, and with reservation of right to the grantor. Such case would clearly be controlled by the principle of the Courtright case (21 Wall. 315), where this Court held that the title to 120 sections authorized to be sold before construction was absolute, because—

> "No conditions therefore of any kind were imposed upon "the State in the disposition of this quantity, Congress "relying upon the good faith of the State to see that its "proceeds were applied for the purposes contemplated "by the Act."

In such case, at the utmost the United States would only be entitled to the same equitable remedy that might obtain in case of a private grantor where consideration had wholly failed. It would have to be pursued in a court of chancery, and could not be effected by a mere legislative declaration.

We therefore maintain with confidence that the conditions subsequent of the Act of 1866 are not to be read in the light or analogy of other and wholly variant statutes. They are to be tested by their own expressions, with resort, in case of ambiguity, to the purpose of Congress as shown by cotemporaneous history. Where the conditions are clearly expressed, resort should neither be had to other grants nor to the common law to ascertain the rights and

remedies of the granting party. In making this grant, it was competent for Congress to attach any conditions to it and to prescribe the penalty for their non-performance. It might have said that in case of breach of any of the prescribed conditions, the grant should be null and void; or that the lands alone should revert to the United States; or that all the grants, rights, privileges, and franchises should be forfeited to the United States by legislative declaration. It did, in fact, prescribe, in Section 19, that unless a fixed stock subscription and payment should be made in a stated time, the whole Act "shall be null and void." That provision distinguishes with greater emphasis the entirely variant language of the other conditions subsequent of the grant of lands. Whilst upon the failure of the prescribed stock subscription and payment the law was to wholly fail, Congress, by apt words of mutuality declared that the several other grants, already made subject to the conditions of construction contained in Section 8, were made and to be accepted subject to the *further* condition that if—

"the said Company make any breach of the conditions "hereof, and allow the same to continue for upwards of "one year, then, in such case, at any time thereafter, the "United States *may do any and all acts and things which "may be needful and necessary to insure a speedy comple-"tion of the said road.*"

We invite the attention of the Court to the peculiar language of this section. When compared with the words of other land grants, it could only have been the result of a deliberate and special purpose to prescribe an entirely different reservation of authority. It limits, by a particular condition, the effect of a breach of the other conditions. It avowedly looks not to forfeiture, but to the

completion of the road; and this will be found to have been the underlying motive of all the Atlantic and Pacific legislation prior to the Act of 1886. By the Act of 1866, Sec. 1, the Company is given "perpetual succession;" authorized to construct and maintain "a continuous rail-"road and telegraph line" from Springfield, Mo., to the Pacific. By Sec. 3 the grant of lands is made not only to aid construction, but "to secure the safe and speedy "transportation of the mails, troops, munitions of war, and "public stores over the route of said line of railway and "its branches," and in Sec. 20 this language is repeated with declared purpose "to secure to the Government at "all times, but particularly in time of war, the use and "benefit of the same. * * *" Every provision of the statute has in view the construction of the road; all the limitations and conditions are to that end. Even the right of alteration, amendment, and repeal in Section 20 is made expressly subject to the same controlling purpose. If there is one thing more clear than another in this carefully drawn law, it is that the Government did not look to getting the land back, but did look to its continuing application to the ultimate building of this national and governmental thoroughfare. The paramount object of the Act of 1866 was clearly to secure construction. Any provisions seeming to look to the resumption of the land grant (whatever their legal effect) did not contemplate a *termination* of the enterprise, but simply such action as would best secure its speedy *completion*.

Therefore, Congress expressly said, in case the conditions of construction were not seasonably performed, *not* that the grant should be null and void; *not* that the lands should revert to the United States; *not* that the grant and franchises should be forfeited; *but* that the United States might take the necessary steps to secure the speedy completion of the road.

This distinction is emphasized by a comparison of the very marked difference between the condition subsequent in this grant and those in nearly all of the other railroad land-grant legislation.

Legislation of this character by Congress began substantially with the grant of September 20, 1850, to the State of Illinois (Stats., Vol. 9, p. 466), wherein the provision was that if the road was not completed within ten years, the title to the residue of unsold lands "*shall reinvest in "the United States.*"

In the grant of June 3, 1856, to the State of Wisconsin (Stat. 11, p. 20) and which was considered by this Court in Schulenberg *v.* Harriman (21 Wall. 44), the provision was that if the road was not completed within ten years, "*the lands unsold shall revert to the United States.*"

In the Union Pacific grant of July 1, 1862 (Stats. 12, p. 489), the provision was that upon failure to complete construction by July 1, 1876, the said roads and their lands and property of every kind "*shall be forfeited to the United States.*"

In the Act of July 23, 1866, Stat. 14, p. 210, and which was under consideration by this Court in Van Wyck *v.* Knevals, 106 U. S. 368, the provision was that upon failure to complete in ten years "*the lands remaining un-*"*patented shall revert to the United States.*"

The following table will exhibit in chronological sequence the various land grants made by Congress wherein, in case of non-completion within the time limited, it was stipulated that there should be an absolute reversion in or reinvestment in or forfeiture of title to the United States:

Feb. 9, 1853, to Missouri,	Stat. at L., Vol. 10, p. 155
June 29, 1854, to Minnesota,	" " 10, p. 302
May 15, 1856, to Iowa,	" " 11, p. 9
May 17, 1856, to Florida,	" " 11, p. 15
June 3, 1856, to Louisiana,	" " 11, p. 18

June 3, 1856, to Alabama,	Stat. at L.,	Vol. 11,	p. 17
June 3, 1856, to Michigan,	"	" 11,	p. 21
Aug. 9, 1856, to Mississippi,	"	" 11,	p. 30
Mch. 3, 1857, to Minnesota,	"	" 11,	p. 195
July 1, 1862, to Union Pacific,	"	" 12,	p. 489
July 2, 1864, to Union Pacific,	"	" 13,	p. 356
Mch. 3, 1863, to Kansas,	"	" 12,	p. 772
Mch. 3, 1863, to Michigan,	"	" 12,	p. 797
May 5, 1864, to Minnesota,	"	" 13,	p. 64
May 12, 1864, to Iowa,	"	" 13,	p. 72
June 20, 1864, to Michigan,	"	" 13,	p. 140
June 2, 1864, to Oregon,	"	" 13,	p. 355
Mch. 3, 1865, to Minnesota,	"	" 13,	p. 526
Mch. 3, 1865, to Michigan,	"	" 13,	p. 519
July 4, 1866, to Minnesota,	"	" 14,	p. 87
July 4, 1866, to Missouri,	"	" 14,	p. 83
July 4, 1866, to Oregon,	"	" 14,	p. 86
July 4, 1866, to Oregon,	"	" 14,	p. 89
July 13, 1866, to Placerville & Sacramento,	"	" 14,	p. 94
July 23, 1866, to St Joe & Denver,	"	" 14,	p. 210
July 25, 1866, to California & Oregon,	"	" 14,	p. 239
July 25, 1866, to Kansas & Neosho Valley,	"	" 14,	p. 236
July 26, 1866, to Kan. So. Branch U. P. R.R.,	"	" 14,	p. 289
Feb. 25, 1867, to Oregon,	"	" 14,	p. 499
Mch. 2, 1867, to Stockton & Copperoplis	"	" 14,	p. 548
Mch. 3, 1869, to Oregon,	"	" 15,	p. 340

Upon the other hand, and as distinguishable from foregoing long and uniform line of legislation, the following table exhibits the only three grants by Congress wherein, in case of non-completion within a prescribed time, there was no provision for reversion or reinvestment or forfeiture, but in lieu thereof only the reserved right to the United States to secure speedy completion:

July 2, 1864, to Northern Pacific,	Stat. at L.,	Vol. 13,	p. 365
July 27, 1866, to Atlantic & Pacific,	"	" 14,	p. 292
Mch. 3, 1871, to Texas Pacific,	"	" 16,	p. 573

It is a significant fact; that in all this legislation, covering a period of twenty years, and comprising thirty-three different Acts upon the same general subject, Congress should have departed from a uniform rule of providing for reversion or forfeiture of unearned lands in only three instances, above recited. The departure was surely not the result of accident or of inadvertence. Those three

laws are among the most elaborate and carefully drawn of all the railroad aid Acts. Congress must be presumed to have had a reason for omitting the usual forfeiture or reverter clause in those cases. That reason undoubtedly was that these were to be transcontinental railroads, to serve a great public purpose and to ensure benefits of national importance, built without aid of governmental money or credit, but by means of private capital alone; that the prescribed routes lay through regions filled with Indians, many of them hostile; and that the lands granted to encourage the investment of private capital in these great enterprises were at the date of the grants of unknown and doubtful value and unsalable at any price. Stipulations were made by the Government to make the land grant available by extinguishment of the Indian titles and by surveying the lands, which, from reasons of public policy or touching the welfare of the Indians, might well have seemed of doubtful accomplishment at any fixed time. It must therefore have seemed to the framers of the Act manifestly inequitable to provide for a forfeiture of the grant and restoration of the lands to the United States, because of failure to complete a work of this magnitude within a certain time, when the work itself was made in the law to depend upon contingencies beyond the power of the Government itself to control, and upon agreed acts, which the Company had no power to compel the Government to perform.

Herein was a valid and sufficient and altogether probable reason for the marked change in the phraseology of this grant from the language of other prior, cotemporaneous and subsequent grants. It was apparent that this road would be valueless as an investment (as indeed it always has been and is) except as a through line. Capital would necessarily discount any plan which involved the possi-

bility of the enterprise being eventually hung up in the air, with a disconnected section of road into an Indian country, uncompleted within the prescribed time, through causes beyond control of the grantee, or directly produced by the acts or omissions of the Government. Nor was the work of any national importance except as a through line. No one knew this better than the framers of this law; and, therefore, the consequence of a failure by the Company to build fast enough, or to finish in time was not to be that the work should stop and all inducement to its further prosecution be taken away, *but that it might go on and go on to speedy completion by the further action of the Government in removing the obstacles to its progress of its own creation.*

It should not be overlooked that railroad legislation was active when this grant of July 27, 1866, was made. The attention of Congress was specially directed to this subject. From the 4th to the 27th of July, 1866, ten such Acts were passed by Congress, every one of which contained the reverter clause except that of the Atlantic and Pacific. Take the grant to the Placerville and Sacramento Railroad, approved July 13, 1866, just two weeks before the Atlantic and Pacific. The 6th and 7th sections of the former embrace the same subjects of conditions, and the breach thereof, which are contained in Sections 8 and 9 of the Atlantic and Pacific law. For purpose of convenient comparison, we will quote the two in parallel columns:

Placerville & Sacramento. *July* 13, 1866.	Atlantic & Pacific. *July* 27, 1866.
Sec. 6. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Placerville and Sacramento Valley Railroad Company, upon and sub-	Sec. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the fol-

ject to the following conditions, namely: That the said Company shall commence the work on said road within one year from the approval of this Act by the President, and shall complete the whole road by the fourth day of July, eighteen hundred and sixty-nine.

SEC. 7. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Placerville & Sacramento Valley Railroad Company accept the same, upon the further condition that if the said Company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, *the title to the public lands herein reserved for the construction of said road shall revert to the United States.*

lowing conditions, namely: That the said Company shall commence the work on said road within two years from the approval of this Act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, A. D. eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition, that if the said Company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, *at any time hereafter the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.*

Can any one read these two provisions and say that they mean the same thing? Can any one consider them in connection with the eight other grants passed by Congress the same month, and the twenty-three others passed before and after, and fail to see the plain intent of Congress to make an entirely different provision as to the Atlantic and Pacific from that contained in the thirty-one other grants with ~~a forfeiture~~ or reverter clause inserted? The only part of the Atlantic and Pacific grant which indicated an intent on the part of Congress to divest the grantee of any rights for failure of timely performance is found in the 19th section. That declared in unequivocal language that unless the Company obtain the required amount of subscriptions within a stipulated time, "*the Act* "*shall be null and void.*" The entire law will be searched in vain for any other indication of an intent by Congress

to reserve power to forfeit the grants, or to resume the fee to the lands, or to do anything whatever in consequence of the failure of timely construction, except such acts as would tend to ensure speedy completion. Even the power of alteration, amendment, or repeal reserved to the United States by Section 20 is expressly limited to the end of "*promoting the construction of said railroad* "*and telegraph line*," and with the further important qualification of "*due regard for the rights of the Atlantic and* "*Pacific Company*." It surely cannot be successfully contended that it tends to "ensure the speedy comple- "tion of the road" or to "promote the construction "thereof" by declaring a legislative forfeiture of the grant and the opening of its land construction fund to public and adverse entry.

We respectfully submit that the maxim "*expressio* "*unius exclusio alterius est*" is most forcible in its application to the construction of the conditions subsequent of this grant. By every means that apt language can effect, Congress has therein excluded the idea of any intended reservation of power to forfeit the grant for failure of timely construction. It has clearly impressed in the language used that it meant not forfeiture, but assistance—not termination, but completion. This is therefore not a case of ambiguity, calling for construction, but one of plain expression, requiring no resort to construction.

II.

WAS NOT SAID GRANT A LEGISLATIVE CONTRACT EQUALLY BINDING UPON BOTH PARTIES THERETO? AND IF DEFAULT UPON PART OF THE RAILROAD COMPANY OCCURRED OR WAS COMPELLED THROUGH FAILURE OF THE UNITED STATES TO PERFORM ITS CONTRACT OBLIGATIONS, COULD THE UNITED STATES ENFORCE SUCH CONDITIONS SUBSEQUENT?

The grant of July 27, 1866, coupled with the obligations on part of the Government attached thereto, was not only a law which incorporated the Company, but it was also a legislative contract. To the performance of such contract obligations the Government was as much bound as the grantee. As this Court said in the Sinking Fund Cases (99 U. S. 719):

"The United States are as much bound by their con-
" tracts as are individuals. If they repudiate their obli-
" gations, it is as much repudiation, with all the wrong
" and reproach that term implies, as it would be if the
" repudiator had been a state or a municipality or a citi-
" zen. No change can be made in the title created by
" the grant of the lands or in the contract for the subsidy
" bonds without the consent of the corporation. All this
" is indisputable."

The grant of lands was to enable the Atlantic and Pacific Railroad to secure a construction fund. The absolute necessity for such governmental aid was the basis of the grant. In the theory of the law the road could not be built without it. Hence Congress said that we will give you this grant to aid you in raising moneys for construction purposes, and we require you to utilize its proceeds by completing construction within a given time, but, as the grant would be otherwise valueless to you, we will agree to do the things necessary to put it into available shape. Those absolutely necessary things, and without which the lands were scarcely worth a penny, were to *extinguish the Indian titles and to survey the lands* (Sections 2 and 6, Act July 27, 1866). The road had to be built from Springfield, Missouri, southwest to the Indian Territory, and *thence west for three hundred and fifty miles through the Indian Territory.* It was promptly built to and as far into the civilized parts of the Indian

Territory as the condition of the unextinguished titles would permit. Then it had to cease operations and await the promised action of the United States in extinguishing those titles. Even if we ignore the absolute non-availability of the land-grant titles, and even if the Railroad Company had the right of transit, which the evidence shows was denied to it (Rec. 56, 298), it could scarcely be contended that it was obliged to transport by wagons (the only possible available method) from Vinita to the western line of the Indian Territory, three hundred and fifty miles, all its laborers, equipments, ties, railway iron, and rolling stock, and then upon the borders of New Mexico commence the westward construction of over sixteen hundred miles of railway, leaving this gap of three hundred and fifty miles, through which no unauthorized party could pass. Especially so when all along the line also of that sixteen hundred miles a large proportion of its land grant was swallowed up by existing Indian reservations, which have not only been continued to this date, but have been largely added to, and new ones created. Independent of the immense proportion of the grant situate along the line of its three hundred and fifty miles in the Indian Territory, and independent also of the several million acres of lands within Indian reservations, existing west of the Indian Territory, at date of the grant, the United States have embraced along the line of actually constructed road more than two and a half million acres within enlarged or wholly new reservations. (Rec. 302, 303.)

Now the realization of aid from the grant pledged by Congress to secure the construction of the road, and the possibility of reimbursement by profitable trade in the operation of the road when constructed, were necessarily dependent upon a promised change in the legal condition

of the land titles along the line of its prescribed route. Yet the United States has not even attempted to fulfil its promise. It has never commenced to put the land grant into condition to be sold, or to be utilized as a profitable means of raising money for construction purposes. On the contrary, it has still further burdened these titles with the very clouds it had stipulated to remove. It would seem to be entirely clear that without the aid of a disposable and usable land grant, no sane men would have built this railroad through the Indian Territory under then existing conditions. The Territory was not only then wholly undeveloped, but by the non-intercourse law, then and now in force, and by the general policy of the Government, it had no immediate prospect of development. The lands were held by the various tribes or nations *in solido* by a title common to all the members of these tribes. A few were engaged in tilling the soil and in raising stock; but labor was generally limited to the absolute necessity of procuring subsistence in its simplest form. Of that sort of industry which would make a railroad a convenience, or furnish commerce for its support, there was practically none. White settlers were excluded and all interstate commerce was either prohibited or so restricted by intercourse regulations as to be of no practical advantage to a common carrier. A railroad east and west through the Indian Territory might as well, for all purposes of passenger or freight traffic, have constructed and operated its line through a continuous tunnel. It would, therefore, be plain that Congress intended to induce the construction of this road only upon the basis of a land subsidy, which the Govenment would make available as a basis for a construction fund; and that all time provisions must be construed upon the basis of a prior fulfilment of the governmental

stipulations as to the condition of the titles. The time of such fulfilment was from questions of public policy, and from considerations looking to the welfare of the Indians, coupled with a reserved discretion in the grantor; but so long as that discretion was exercised and performance withheld, the United States was not in position to assert a right of forfeiture. In other words, so long as fulfilment by the Company remained impossible because of the failure of the United States to keep their promises, no matter for what reason, so long the power to insist upon performance by the railroad grantee was postponed.

The same reasoning applies to the provision to survey the lands, and possibly with greater force. There were no considerations of public policy to restrain the United States from making surveys where at least the lands were public. It was simply a failure to make the appropriations necessary to put the surveying parties in the field. It was a palpable omission to perform an agreed duty. It was even more indefensible, because the Railroad Company offered to put up the money for such surveys, which offers the United States refused to accept. (Rec. 259–262.) The lands are largely unsurveyed to-day. By reason thereof the lands are unoccupied and the Company has derived no profit from construction or from operation upon the constructed part of its line from Albuquerque in New Mexico to Mojave in California; it has not even earned enough, as the evidence shows, to pay its operating expenses and fixed charges by about six millions of dollars.

It is confidently submitted that the United States can lawfully exercise no reserved right of forfeiture or otherwise under the contract of July 27, 1866, so long as the United States effectually bars the way to agreed performance by the Railroad Company by failure to make the grant available through the stipulated extinguishment of

the Indian titles and by identifying the grant by surveys. The principle contended for has been heretofore announced by this Court. In Davis *v.* Gray (15 Wall. 230), it was ruled that—

"The rule at law is, that if a condition subsequent be "possible at the time of making it, and becomes after- "wards impossible to be complied with, by the act of "God, or the law, *or the grantor*, the estate having once "vested, is not thereby divested, but becomes absolute. "The analogy of that rule applied here would blot out "these conditions. But this would be harsh and work "injustice. Equity will therefore not apply the rule to "that extent. It will regard the conditions as if no par- "ticular time for performance was specified."

III.

WERE NOT THE RIGHTS RESERVED TO THE UNITED STATES BY THE ACT OF JULY 27, 1866, SUBORDINATED TO THE RIGHTS ACQUIRED BY THE SUBSEQUENT ACT OF APRIL 20, 1871?

This question is equally pertinent whatever may be determined to be the reserved power of the United States under the Act of July 27, 1866.

At the time of the enactment of the law of April 20, 1871, the Railroad Company was in default as to the condition contained in Section 8 of the Act of July 27, 1866. Construction had ceased for several years. Whatever was the reserved power of the United States upon condition broken, it had then attached and was fully enforcible. Upon and applicable to this condition of existing default and right of re-entry for condition broken, the Act of 1871 was enacted. If it had been the intention of Congress that upon such existing default construction should cease

and the enterprise terminate, it would surely have legislated in this Act of 1871, in unambiguous terms, for the resumption of the grant, or upon the continuance of such right of resumption, if that was the reserved power in the Act of 1866. Instead of this the action of Congress, upon the construction for which we contend, was in exact conformity with the powers reserved in Sections 9 and 20, viz., to alter or add to the Act *so as to promote the construction and ensure the completion of the road.* For that purpose the Act of 1871 offered a fresh inducement to the investment of private capital in this national work. To that end, it authorized the Company to mortgage its lands to secure bonds to be issued, with the one solitary limitation in the form of a *proviso*, that, in case of subsequent breach of condition, the right of the mortgagees should only extend to lands coterminous with road constructed—when?

Not at the time of the breach of condition;

Not at the time of attempted forfeiture by the United States;

But

"*at the time of the foreclosure of said mortgages.*"

For convenience of reference by the Court we here reprint the Act of 1871:

"*Be it enacted*, &c., That the Atlantic and Pacific Rail-
" road Company, organized under Act of Congress of July
" twenty-seventh, eighteen hundred and sixty-six, is hereby
" authorized to make and issue its bonds in such form and
" manner, for such sums, payable at such times and bear-
" ing such rate of interest, and to dispose of them on such
" terms as its directors may deem advisable; and to secure
" said bonds the said Company may mortgage its road,
" equipment, lands, franchises, privileges, and other rights
" and property, subject to such terms, conditions, and

" limitations as its directors may prescribe. As proof and " notice of the legal execution and effectual delivery of " any mortgage hereafter made by said Company, it shall " be filed and recorded in the office of the Secretary of the " Interior; *Provided*, That if the Company shall hereafter " suffer any breach of the conditions of the Act above re- " ferred to, under which it is organized, the rights of those " claiming under any mortgage made by the Company to " the lands granted to it by said Act shall extend only to " so much thereof as shall be coterminous with or apper- " tain to that part of said road which shall have been con- " structed at the time of the foreclosure of said mort- " gage."

The question turns upon the proviso. There is nothing ambiguous in its language. "At the time of the foreclos- " ure of said mortgage" are words of common and every-day use. Lawyer and layman understand them alike. The only way to avoid their ordinary effect is to construe them out of existence, either by treating those words as surplusage, or by substituting others in their stead. It is surely a reasonable contention, that if by the terms of the original Act an absolute forfeiture of the grant was to be the consequence of a breach of condition, and if it had been the intention of Congress, while granting subsequent authority to mortgage the grant, to limit the right of mortgagees to lands appertaining to road constructed *at date of the breach*, or *at date of forfeiture*, Congress would have said so in apt terms. It would not have left room for doubt as to its intent.

There is nothing in the Act of 1871 to disturb the usual construction of the language employed, nor to limit its literal meaning. One is forced to go outside of that law, and to fall back upon the statute of July 27, 1866, to find a plausible basis for a different construction. The contention against us, then, seems to be that the Act of

1871 was an *amendment* or *addition* to the grant of 1866; that the mortgagees under Act of 1871 are, therefore, chargeable with notice of all the reservations of power to the United States under the Act of 1866; and that to extend the prior lien of the mortgagees in the land grant up to the time when they might choose to institute foreclosure proceedings would not only be inharmonious with the power of resumption reserved to the United States in the Act of 1866, but would be such a unilateral contract as to put the rights of the United States into a control diametrically hostile to, and without remedy on the part of, the Government. Hence, it is reasoned, that the concluding words of this 1871 Act must be treated as surplusage, or be construed as if they read, "at the time of "forfeiture by the United States," instead of "at the "time of the foreclosure of said mortgage."

It is, however, obvious that if those concluding words of the law of 1871 are treated as surplusage, then that entire Act must equally be treated as surplusage. This follows, for the reason that, if those concluding words do not take on their legal meaning, the whole Act is meaningless; it has effected nothing that did not quite as plainly and lawfully exist before it was enacted. The 1866 grant of lands was *in præsenti*. The Company was not only fully empowered to sell its title thereto, but it had equally a common-law right to mortgage them. To raise money for construction was the very purpose of the grant, and those moneys could be as well raised by pledge as by sale of the land subsidy. In the numerous land grants previously and subsequently made by Congress, the power to mortgage was always implied. Yet no embarrassment was experienced on that account. The United States and Europe have been shingled over with the bonds secured by such mortgages, whose validity has

never been questioned. So that, if the issue of bonds by the directors, and the execution of a mortgage to secure them, was all that was intended to be accomplished by the law, that power previously existed, and all of this 1871 law was unnecessary. Or, if a limitation of the remedy of the mortgagees to the constructed parts of the road—to *earned lands*—was its object, that limitation equally obtained in the absence of this law. The mortgagees at common law would have taken with notice of the lien of the Government, and that lien would have been enforceable against the *unearned* lands. We must, therefore, give to these concluding words of the 1871 law a different and additional meaning, or we must in effect blot out the whole of that law, because the construction contended for by the defendant in error of this Act of 1871 would make that Act, in effect, read thus, viz: "This "Company shall have the same right to mortgage these "lands as it would have had if this Act had not been "passed."

If, then, such different meaning can be derived as will be reasonable and consistent, such construction should be preferable to one that treats the law as mere surplusage, or absolute nonsense.

The mode prescribed by Sec. 20 of the Act of July 27, 1866, for the exercise of whatever reserved power the Government possessed, was that "Congress may at any "time, having due regard for the rights of said Atlantic "and Pacific Railroad Company, add to, alter, amend, or "repeal this Act."

Very clearly the 1871 Act was not a "repeal" of the 1866 law, so *that* reserved power was not exercised. *Non constat* that it was intended to "add to" or to "amend." *Why may it not have been the legislative purpose to "alter" the original contract?* It should be remembered that

such reserved right as the United States had, whatever might be its quality, had clearly existed for three years prior to 1871. This Company then came before Congress in admitted default. Concededly it had not been able to raise the money to build the road. It had not built the road. Construction had ceased. It represented that it could not proceed under the terms of the Act of 1866. It showed that unless the United States would liberalize the the terms of this legislative contract further construction was impossible. It averred that capitalists would not furnish the millions of money necessary to carry such a great enterprise forward, because primarily all the security in event of default was reserved to the Government, *and that default had already occurred.* Capitalists naturally declined to put up money on that doubtful basis. They said to the Company:

"If we take your bonds upon the security of this thing, "not *in esse*—upon this mere possibility of a future rail- "road—you get our money at once in exchange for your "bonds; yet, if you do not seasonably expend the money "in the construction of this road, the United States can "step in at any moment and eat up all our security. It "can do so now, because you are already in default. We "cannot even take such primary hold of the matter as to "secure the faithful application of our funds to the com- "pletion of the road, the very purpose for which our "moneys are to be loaned you. Under any circum- "stances, our right of intervention would not accrue until "future default had occurred, and right there the United "States could also intervene and take precedence of us. "You must get the Government to give priority to our "lien, or we can see no security for us upon your lands."

It was as competent for the United States to have denied this request as it was competent for capitalists, *not yet in this enterprise,* to refuse to engage therein unless

the request was granted. The United States would have denied it, promptly denied it, if the recovery of its grants had been its inducement. On the contrary, it was especially desired that this road should be built. *Construction of the road* was the objective point of legislation. *Termination* of the enterprise was not contemplated. As was said in 91 *U. S.* 80, in relation to the Union Pacific grant:

> "This enterprise was viewed as a national undertaking "for national purposes, and the public mind was directed "to the end in view, rather than to the particular means "of securing it."

Therefore Congress, by this Act of 1871, intentionally legislated, 1st, to condone all past default, the language used being "that if the Company shall *hereafter* suffer any "breach of the conditions," &c.; 2d, to entirely change the conditions of the legislative contract so as to subordinate the reserved power of the Government to the rights of the mortgagees. The words "At the time of re-entry upon "conditions broken" were purposely stricken from the meaning of the contract, and in lieu thereof was inserted the equally plain but essentially variant words, "at the "time of the foreclosure of the mortgage." If the corporation failed to apply the land grant and the moneys raised thereon to seasonable construction, Congress assumed that the mortgagees would intervene for their own protection, and would see that their security was made good by construction. It further assumed that a foreclosure of their mortgages would be evidence that both the Company and its mortgagees had abandoned the work; and in *such* event it provided that the United States could *then* see to the intended application of the residue of lands not coterminus with construction.

This was in harmony with the previous legislation of

Congress as to the Union Pacific Railroad and its branches under the Acts of 1862 and 1864. Section 17 of the Act of July 1, 1862, enacted as follows :

"*Provided*, That if said roads are not completed so as " to form a continuous line of railroad, ready for use, " from the Missouri River to the navigable waters of the " Sacramento River, in California, by the first day of July, " 1876, the *whole* of all of said railroads before mentioned " and to be constructed under the provisions of this Act, " *together with all their furniture, fixtures, rolling-stock,* " *machine-shops, lands, tenements, and hereditaments and* " *property of every kind and character*, shall be forfeited " to and taken possession of by the United States."

In addition thereto, Section 5 of the same Act granted a bond subsidy, and made their issue and delivery *ipso facto* to constitute a first mortgage upon the lands, franchises, and other privileges of the Company.

Yet by Section 10 of the Act of July 2, 1864, Congress authorized the Company to secure its own bonds by a first mortgage, and made the Government lien a second mortgage. And whilst the authority to so mortgage was to be exercised "on the completion of each section of said " road," yet that expressly waived *pro tanto* the forfeiture of the " *whole* of all of said railroads," &c. The comparison also gives additional force to our construction of the Act of 1866, because the right to mortgage by the Act of 1864 was expressly confined to constructed sections, whilst the right to mortgage by the Act of 1871 extended to all the powers and grants of the Company, the existence or enjoyment whereof was a future expectancy. In the Atlantic and Pacific case, Congress, by way of additional inducement to private capital to build this road *without* the aid of United States bonds, then being extended to competing lines, simply authorized the Company to issue

its bonds upon the security of the granted lands, and assured the investors that their lien should be good on all lands earned up to time of foreclosure, and waived the time of completion to that extent. In other words, *default as to the condition having then occurred*, the United States, in the exercise of the powers specially reserved by Sections 9 and 20, and *as a step looking towards the completion of the road, altered the condition.* Whilst authorizing the Company to mortgage *all* its property, earned and unearned, Congress protected the United States and the Company, in event of foreclosure, by limiting in that contingency the rights of the mortgagees to the then *earned* lands, thus preserving the unearned lands as a basis for capital with which to complete the road.

In direct reply to all attempts to change the expressed meaning of this law, or to do away with it by construction, we apply the language of this Court in Aldridge *v.* Williams, 3 How. 24:

"The law, as it passed, is the will of both houses, and "the only mode in which that will is spoken is in the Act "itself, and we must gather their intention from the lan- "guage there used, comparing it, when any ambiguity ex- "ists, with laws upon the same subject, and looking, if "necessary, to the public history of the times in which it "was passed."

It has, however, been urged as a sufficient reply to our contention, that, in the event of a continuing failure to *bona fide* construct this road, the United States would be without remedy unless the mortgagees *choose* to foreclose. This argument is not sound. It is the familiar case of intervention, by a second mortgagee. If the obligation secured by the first mortgage has matured, and the mortgagor is neither making efforts to pay it off, nor the

mortgagee to enforce his lien, an undoubted right rests in the second mortgagee to intervene and compel foreclosure. Equally so if the trust fund is being wasted or impaired so that there would be a clear remedy in the United States at date of maturity of the railroad bonds, viz., in 1910.

The same reasoning would equally establish the remedy of the United States at any date preceding the maturity of the bonds, if construction was not *bona fide* proceeding, and was being unreasonably delayed. If A granted lands in trust to B for the purpose of raising money by mortgage to construct a building for a charitable purpose, and the money, having been so raised, was not being expended in execution of the trust, surely A could intervene to compel the performance of the trust. Courts will never allow a clear trust to fail for want of a trustee, nor will they allow a trust to fail by reason of any act of omission of the trustee. Therefore a trust will never be permitted to fail or be defeated by the refusal or omission of a trustee to execute a power which has been so given that it should and can be exercised. (2 *Story Eq.*, 976 *et seq.*; *Perry on Trusts*, *Vol.* 1, *p.* 320.)

It is respectfully submitted, in conclusion, upon this point, that the assumed difficulties in the true construction of this law will disappear so as to harmonize all of its parts with preceding legislation, if construction does not proceed upon the ancient basis of a technical common-law condition, but rather upon the modern doctrine of a trust coupled with the grant. It was said by Lord St Leonards (*Sugden on Powers*, 122):

"And in regard to its being an estate upon condition, we
" may observe that what by the old law was deemed a de-
" vise upon condition would now, perhaps, in almost every
" case, be construed a devise in fee upon trust, and by this

" construction, instead of the heir taking advantage of the " condition broken, the *cestui que trust* can compel an ob- " servance of the trust by a suit in equity."

It has been well said by an able lawyer in another case that if this modification of the common-law doctrine is now sanctioned in case of devise, in order to effectuate the intention of the devisor, is it not a reasonable contention that a like rule should be applied to the peculiarly worded conditions of a grant like the one here under consideration; and that they be held to be enforceable as trusts binding on the grantee, and not as conditions upon breach of which forfeitures will result, without securing the public benefit contemplated in the grant.

IV.

CAN THE LEGAL TITLE ONCE VESTED UNDER THE ACT OF JULY 27, 1866, BE DIVESTED BY MERE LEGISLATIVE DECLARATION, CONTAINING NO PROVISION FOR ANY JUDICIAL ENQUIRY INTO THE FACTS UPON WHICH IT IS FOUNDED AND EXTENDING TO THE GRANTEE NO OPPORTUNITY OF URGING ANY EQUITABLE OR OTHER CONSIDERATION BY REASON OF WHICH THE BREACH OF CONDITION MIGHT BE EXCUSED, OR THE CONDITION ITSELF BE DISCHARGED?

The Act of 1886 is a naked declaration of forfeiture and a legislative restoration of the lands to the public domain. It contains no recital of breach of condition. It alleges no failure of performance upon part of the grantee. It provides for no judicial enquiry into alleged facts of failure to perform, nor the legal effect thereof, nor offsets thereto. It authorizes no subsequent proceedings of any kind to effect a forfeiture or to extend a hearing to the parties in interest. It contains no suggestion of any purpose of de-

voting the lands to the completion of the road in some other way, or even through some other agency. There is no provision protecting the vested rights of the mortgagees, nor making the proposed restoration of the lands subject to their possible rights. The law simply declares forfeiture and requires an immediate restoration of the lands to the public domain. It seeks by legislative declaration to divest the outstanding fee-simple title, and by mere force of the statute to reinvest that title absolutely in the United States.

The power of the United States to take these lands from the Railroad Company and apply them in some other way or through some other agency to the construction of the "continuous" highway provided for by the Act of 1866 may not be seriously challenged, but the forfeiture Act of 1886 does not even pretend to do that. It simply restores the lands to the public domain, and thereby subjects them to sale and entry under the general public land laws. Where then, as in this case, the United States patents them off to an individual entryman, it is manifest they cannot be applied to the purpose to which they were thus originally dedicated, viz., the final completed construction of this "continuous" national and governmental highway under the contract of the United States to devote them to *that* purpose and no other.

We submit that a mere legislative declaration is not valid so as to effectuate that purpose; that it operates simply as an announcement of the legislative will to assert the reserved rights of the Government; but that some proceeding, which shall have a semblance of "due process of law," must follow to determine the rights involved, so as to divest the title of the grantee and to reinvest it in the grantor.

The Government and the Railroad Company, so far as

their mutual obligations and rights of property are concerned, stand in the relation of contracting parties, and not of sovereign and subject. Upon common-law principles it would clearly be incompetent for the Government to simply legislate the title granted back into itself, without some method being provided for determining the nature and effect of the alleged conditions subsequent, or whether same had been broken, or waived or performance thereof excused, and some ascertainment of the lands to be directly affected.

The Government, dealing in its own case and with its own contract, stands in no different attitude from an individual. The individual must resort to some appropriate judicial proceeding to support his *claim* that the conditions of his contract have been broken. As was said by Alexander Hamilton in his celebrated communication to the Senate of January 20, 1795, "when a government "enters into a contract with an individual, it deposes, as "to the matter of the contract, its constitutional authority, "and exchanges the character of legislator for that of a "moral agent, with the same rights and obligations as an "individual. Its promises may be justly considered as "excepted out of its power to legislate, unless in aid of "them. It is in theory impossible to reconcile the idea "of a promise which obliges with a power to make a law "which can vary the effect of it."

3 Hamilton's Works, 518, 519.

And where this Court has heretofore recognized the power to proceed by direct legislative declaration, the operation of that right has uniformly been restricted to cases where the granting Act in express terms reserved the authority to so declare a forfeiture.

Farnsworth v. *Minn. & Pac. R.R. Co.*, 92 U. S. 66.

It truly cannot be successfully maintained that such express authority to declare a legislative confiscation of the grant is reserved by the terms of the Atlantic and Pacific Act. The Act of 1886 can only be fairly construed as an evidence of the election of the Government to treat the conditions of the grant of 1866 as broken *as a basis* for availing itself of such breach by a recovery through appropriate judicial proceedings. The exceptional language of the statute affords no just ground for divesting titles resting upon public record without those forms of judicial enquiry which have been uniformly held to constitute "due process of law." We do not deem it necessary to accumulate authorities upon the point that due process of law means in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights.

CONCLUSION.

For these several reasons we submit that the Act of July 6, 1886, is unconstitutional and void. It is not that "due process of law" which would be effectual to divest the legal title of the Railroad Company. If the legislative contract devoted these lands to a construction fund and reserved to the United States only the power to see to the application of that fund to construction purposes; or if the United States contracted to do certain things to make that fund available to the grantee, and has failed to keep that agreement; or if the subsequent law of 1871 subordinated the rights of the Government to those of the mortgagees; or if a mere legislative declaration of forfeiture and order to restore lands to general disposition is in excess of the reserved authority of the United

States, in this case the logical conclusion is inevitable on one or all of these grounds that the forfeiture Act is unconstitutional and void, not only as against the holders of bonds issued under the Act of 1871, but also wholly and altogether void for any purpose whatsoever.

The legislation of Congress pertaining to this grant should be construed as an entirety. It should be read in connection with contemporaneous facts and having due relation to the intended object of Congress and to the protection guaranteed to those who advance the moneys for construction purposes. This grant was vastly different from the conditional grants of land in aid of existing local corporations, or of grants to states in aid of railroad enterprises that had been or might be incorporated under State laws. It was in itself an Act of incorporation—a charter,—a legislative contract of the highest character known to the law, around which the courts of the country, ever since the Dartmouth College case, have thrown the mantle of their protection. To the corporation thus created, the public were invited to subscribe.

Subscriptions to the amount of $1,000,000 *must* be had within two years—the one and only condition to which any penalty was attached. These subscriptions were invited and required upon the faith of the terms of the Act, that while construction of the road was enjoined at a given speed, and completion by the Company by a fixed date, yet if these failed, the United States might help out the enterprise and not strangle it in its cradle. The inducement held out to subscribers was that what they put into the work should not be lost through subsequent misfortune, but might be made valuable by completion of the road in some other way. The object on the part of the United States, as expressly declared in Section 20, was "to promote the public interest and welfare," and

"to secure to the Government at all times, and par-
" ticularly in time of war, the use and benefit of the road
" for postal, military, and other purposes." It was to obtain this without cost, except in lands of no value then, and much of them of none now; but whereof the alternate sections were, nevertheless, to be reserved for sale by the Government at double price.

And through what country was this road to be built? For nine out of twelve years prescribed for completion by the Company no engineering or construction party could operate upon 500 miles of the prescribed route eastward from New Mexico except under armed guard; and during much of that time it would have required a large force of the United States army to maintain them there. Sheridan's campaign against the Kiowas, Arapahoes, and associated Indians was made in 1867 and 1868. Hostile Comanches from the region traversed by the Canadian River ravaged eastern New Mexico in 1873 and 1874, killing numbers of people in Colfax, Mora, and San Miguel counties. The United States troops were fighting them in the Panhandle in 1874 and 1875, and it was not until the latter year that the final defeat and disarmament of that powerful tribe was accomplished by Gen. McKenzie.

It is to those times that we must look to find what was in the mind of Congress in making this contract, and what people had to consider when they subscribed to the enterprise. The Company did not abandon the project, but struggled on against the appalling difficulties confronting it. A financial panic which paralyzed all railroad building in the West for five years magnified and multiplied these. Nevertheless, when the forfeiture Act was passed, the Company had built and in operation on the located line about 1,000 miles, in two separate sections, of railroad which does not pay, and never will pay, until the original plan is carried out.

By its charter, read in the light of the times when it was made, and by the acts of the Government then and afterwards, the Company asks that its rights be measured.

By the express words of that charter those rights were made inviolable. The power to alter, amend, or repeal the Act is only to be exercised "*with due regard for the rights of the Atlantic & Pacific Company.*" Forfeiture of its lands without enquiry cannot be accomplished without a complete *disregard* of those rights. To protect all persons in the enjoyment of rights thus guaranteed against invasion, even in the name of the Government, is the high function of the judiciary. In the exercise of that great power, and upon the case herein presented, we invoke the deliberate judgment of the Court.

Respectfully submitted.

E. J. PHELPS,
A. T. BRITTON,
A. B. BROWNE,
Attys. for Plaintiff in Error.

165-413

Office Supreme Court, U. S.
FILED.
DEC 15 1896
JAMES H. McKENNEY,
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165-413

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ATLANTIC AND PACIFIC RAILROAD Company, plaintiff in error,
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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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FACTS.

The statement set out in the brief for plaintiff in error is, from a misapprehension of some facts and a failure to state others, which, doubtless, appeared to be immaterial, in some respects erroneous and misleading.

On page 3 it is said that it is undisputed that "the United States have not only failed to extinguish the Indian title to lands along the prescribed route of the road, but have since further encumbered the grant by the *creation* of additional Indian reservations *carved out of the granted lands.*"

This requires some comment and modification, which will appear in that part of the brief addressed particularly to that subject.

It is said on page 4:

> It is in evidence and is not disputed that the United States have largely failed to thus survey the lands, although repeatedly urged and requested so to do by the railroad company. (Rec., 286, 287, 304.)

This also is treated particularly under a separate head.

On page 5 it is said:

> Up to April 20, 1871, the company had only *been able* to construct 75 miles of road, extending westward from its initial point at Springfield, Mo.

It is in proof that the company did not construct except as stated. It never filed its maps of definite location, or even one of general route, on the remainder of its line until 1872, which was six years after the grant was made, and but six years before the expiration of the time limited by the act for completing the entire road.

On page 7 it is stated that $3,590,629 of bonds on the Central Division are outstanding "according to the record."

On page 12 of the record this statement is made, the sum being composed of the $796,629 land-grant bonds and $2,794,000 of the first-mortgage bonds on that division. This statement can hardly be true, for on page 161 the first mortgage provides as follows:

> The said grant and conveyance is, however, subject to a lien upon said franchises and property of said Central division to the extent of one million one

> hundred and eighty-nine thousand and nine hundred and five dollars of outstanding railroad and land-grant bonds, issued under and secured by a prior mortgage on said Central division, dated the first day of November, 1871, which said outstanding bonds the party of the first part hereby covenants and agrees to procure and cancel as soon as possible by giving in exchange therefor the first of the bonds issued hereunder, or by purchasing them out of the proceeds of the first sale of the bonds issued hereunder, a majority both in number and interest of the holders of said outstanding prior bonds having already agreed to accept an equal amount of the bonds issued hereunder in exchange therefor. The said party of the first part covenants that no further bonds shall be issued under said prior mortgage, and that as soon as the said outstanding bonds shall have been procured and canceled the said prior mortgage shall be thereupon immediately canceled and destroyed.

Thus it appears that $1,189,905 of land-grant mortgage bonds were issued instead of $796,629, as stated on page 112, and that the bonds under both mortgages could not be outstanding and unpaid without a manifest violation of the terms of the mortgage, and it is not presumable that the Central Trust Company of New York was a party to such conduct.

The 62 additional miles in the Indian Territory were constructed *after the forfeiture of the land grant.* (Rec., p. 299.)

The brief (p. 7) says, after referring to the date, 1880, "There were *then* constructed and equipped at a cost of $16,000,000 about 560 miles from at or near Albuquerque to The Needles." This means *thereafter,* for these 560

miles were all constructed after 1880. (Rec., p. 299.) Only 125 miles had been constructed by July 4, 1878, the limit fixed in the granting act for the completion of the road, thus leaving unfinished more than 2,000 miles. (Rec., p. 326.)

The brief proceeds (p. 7):

> Furthermore, by contract of purchase at the price of about $7,290,000, 243 miles of road, *on the exact line of its definite location*, were acquired, extending from the eastern boundary of California through the Mojave Desert to Mojave in California.

The court knows from the decision in *United States* v. *Southern Pacific R. R. Co.* (146 U. S., 570), and the case now before it of *Southern Pacific R. R. Co.* v. *United States*, that this is an error. The "exact line of definite location" did not go to Mojave. There was a map offered in 1869 along this route, but it was rejected, and this never did become the "line of definite location" of the Atlantic and Pacific Company. Therefore, the suggestion that this company is actually operating these 243 miles along the route contemplated by the granting act is erroneous.

The brief (p. 8) says: "The company has thus about 1,228 miles of constructed road." Of this only about 600 miles are on the line of its definite location.

The report of the Committee on Public Lands made in 1886 to Congress shows:

> (1) That the Atlantic and Pacific Company never completed but 34 miles of the road which it now claims to own.

(2) That the time when the main line should have been completed (July 4, 1878) there was uncompleted 2,267 miles of that line.

(3) That said company at no time since its creation has been, and is now, able to complete the road.

(4) That the stockholders of the Atchison, Topeka and Santa Fe and the St. Louis and San Francisco railroad companies own most of its capital stock.

(5) That these corporations caused the mortgages to be executed on the franchises, rights, and property, including the land grant, and caused the bonds to be issued and guaranteed their payment, and took the bonds when so issued and now hold them.

(6) That they virtually own and control the Atlantic and Pacific Company and all its property, together with its mortgage and bonded indebtedness, and are holding them and allowing the company to maintain a mere nominal existence. (Rec., p. 329.)

POINTS AND ARGUMENT.

1.

WHAT WERE THE CONDITIONS SUBSEQUENT OF THE GRANT OF JULY 27, 1866?

The brief for plaintiff in error (p. 14) contains the following:

> Whilst upon the failure of the prescribed stock subscription and payment the law was to wholly fail, Congress, by apt words of mutuality, declared that the several other grants, already made subject to the conditions of construction contained in section 8, were made and to be accepted subject to the further condition that if "the said company make any breach of the conditions hereof, and allow the same

to continue for upwards of one year, then, in such case, at any time thereafter, the United States *may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.*"

The argument is made to turn upon the *further* condition expressed in section 9.

The sections are as follows:

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Thus it is perfectly manifest that by section 8 "each and every grant, right, and privilege" was made upon and subject to the above expressed conditions.

The United States had a right to forfeit the land grant for the breach of these conditions subsequent. (Littleton, pp. 328, 329, 330, Com. Dig. Condition A 2; 2 Wood. Com., Powell's ed., 505, 512, et seq.; *Wheeler* v. *Walker*, 2 Conn., 201; *Sharon Iron Co.* v. *Erie*, 41 Penn. St., 341; *Taylor* v. *Cedar Rapids R. R. Co.*, 25 Iowa, 371; *Attorney-General* v. *Merrimack Co.*, 14 Gray, 612; *Hadley* v. *Hadley*, 4 Gray, 145; *Rawson* v. *School District*, 7 All., 128; *Caw* v. *Robertson*, 1 Selden, 125; *Pickle* v. *McKissick*, 21 Penn. St., 232; *Hooper* v. *Cummings*, 45 Me., 359; *Chapin* v. *School*, 35 N. H., 450; *Wiggin* v. *Berry*, 2 Foster, 114; *Hayden* v. *Stoughton*, 5 Pick., 534; *Wright* v. *Tuttle*, 4 Day, 326.)

The plaintiff in error seems to treat the question as if these conditions did not exist, and as if they were merged in the *further* condition set out in section 9.

The position is baldly taken in plaintiff in error's brief (p. 14 et seq.) that section 9 "limits by a particular condition the effect of a breach of the other conditions. It avowedly looks not to a forfeiture, but to the completion of the road."

It is insisted for the Government that section 9 provided in fact, as it did in terms, a *further* condition, and that this did not merge or supersede the other conditions to which it was added, and that if under the law a right of forfeiture existed for a breach of the conditions expressed in section 8, this right was in nowise impaired by the provisions of section 9.

If, under section 8, the United States could, by proper proceedings, reenter after breach, and be possessed as of

their former estate, the addition of a *further* condition would not cut down this right, and instead of *enlarging* the remedy of the Government, operate to restrict it and make a subtraction of what was meant to be an addition. This would be contrary to the settled doctrine applied to the construction of grants by the Government, which is that such grants are to be construed most advantageously to the interests of the Government. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet., 544; *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 23 How., 88; *Rice* v. *Railroad*, 1 Black, 380; *The Binghamton Bridge*, 3 Wall., 75; *The Delaware Railroad Tax Case*, 18 Wall., 225; *United States* v. *Herron*, 20 Wall., 263; *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 740; *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 666; *Slidell* v. *Grandjean*, 111 U. S., 437; *Stein* v. *Bienville Water Supply Co.*, 141 U. S., 79; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S., 562.)

If section 9 is to be construed as providing that the company accepted the grant on a *further* condition, in addition to those set out in section 8, then manifestly its meaning is that, if the Government should not choose to exercise the naked right of reentry for breach of the conditions in section 8, it could, provided any such breaches should continue for more than a year, do something other than repossess itself of the lands, viz: "Any and all acts and things which may be needful and necessary to insure a speedy completion of the road." What these things might be, and how far the Government might go in dealing with the company, *treating the grant*

as unforfeited, but doing things to insure the speedy completion of the read, it is bootless now to inquire. That inquiry is not now material, as no questions arise as to doing any such thing, and it is not necessary to speculate as to what Congress might have tried to do. The present inquiry is, Whether such things were all that the Government could do, or whether they constituted a *further* remedy in addition to the right of forfeiture and reentry for breach of the specific conditions subsequent set out in section 8.

But if it be conceded that the condition in section 9 superseded the right to forfeiture, which arose as a matter of law from the conditions in section 8, and that the remedy of the Government must be founded on section 9, it is clear that the right to declare a legislative forfeiture could be predicated on that section.

The grants were upon the express condition, in section 9 that, upon a breach continued for a year, "at any time hereafter the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

Was this condition for the benefit of the defaulting railroad company, or for the Government, and to enable it to carry out this great national enterprise? Conditions in grants are in behalf of and for the benefit of the grantor and not the grantee. The rights of the railroad company, so far as this section is concerned, were determinable after the continued breach for a year. Then, when the Government intervened, it was not to preserve the rights of the company, but to effectuate its own purposes. The first step taken was a legal reassertion of its

title. If Congress thought this act "needful and necessary," no one could gainsay it.

Then the railroad company was cut off, and the "subsequent proceedings interested *it* no more." When its rights ended it had nothing to say as to how Congress should use these grants for carrying out this enterprise. Congress was not bound to consult the railroad company. If so, then, after action, in accordance with this condition subsequent, which Congress considered "needful and necessary," and by which the title of the company was divested, the company, notwithstanding the termination of its title, had a right to demand that its forfeited interest in the lands be in some way consulted. Congress might under section 9 have dealt differently with the company, and might have legislated looking to a completion of the road through its instrumentality, but it did not choose to adopt this method with a concern that had so entirely disappointed all expectations.

If, after forfeiture, Congress concluded that there were enough land-aided transcontinental railroads, and that it would be to the public interest to open these lands to settlement, the Atlantic and Pacific Company could not object.

Section 20 is as follows:

> *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any

> time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act.

This covers the same field as does section 9, but it goes much further, and applies, not only to the *construction* of the road, but "keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use," etc.

Great stress seems to be laid in the argument (brief, p. 16) upon the fact that other land grants provided in terms for the lands "reinvesting in" or "reverting to" or being "forfeited to" the United States, and special reference is made to the following acts: 9 Stat., 466; 11 Stat., 20; 12 Stat., 489, and 14 Stat., 210.

In the first and second acts referred to, the grants were not *upon condition*, as in this act. There was no condition whatever in them, and so no right of reentry. The only remedy was that the title should reinvest as to lands undisposed of. The same is true in effect in respect of the third act. The only *condition* expressed is in section 6, and this does not apply to the noncompletion of the road, but to things to be done subsequent thereto.

Under the *condition* expressed there was no right of reentry for failure to build.

In sections 14 and 15, which deal with the time of construction, there is no naked condition whatever, but it is provided that for failure to do certain specified things there shall be a forfeiture.

The same is true in regard to the fourth act referred to—that for aiding in the construction of the Northern Kansas Railroad and Telegraph.

In short, in those acts the Government, by a special provision, secured a right which, in the act under consideration, followed from the *grant upon condition*.

In *Schulenberg* v. *Harriman* (21 Wall., 62, 63), the court expressly treated these provisions as equivalent, and said that whether the grant was upon condition subsequent, or without being upon condition provided for revesting of title, some act was necessary upon the part of the Government to destroy the title of the grantee, such as judicial proceedings, office found, or legislative act.

The argument implied in the brief is that the Government had no right to reenter under this act because it did not provide the remedy reserved in those acts.

The brief sets out a list of acts which, it is said, contains provisions for "absolute reversion in or forfeiture of title to the United States" (p. 16).

This is of no significance if these acts, like those above referred to, were not grants upon condition.

If any of them were upon condition and likewise had provided for reversion of title, and the court had decided that the right to reenter rested on the latter provision, there would be force in the argument. That the court decided that there was a right of reentry because there was a provision for revesting of title on failure to complete the road, is no argument that such right could exist only by virtue of such a clause.

Three acts are named (p. 17) which are, it is said, the *only* grants by Congress which failed to provide for reversion of title.

This is an error, for the grant to the road from Portland to Astoria contained no such provisions, but was simply a grant "upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years," etc. (16 Stat., 94.)

As is known to the court, this grant was forfeited by legislative act.

A search might reveal other similar acts. This is sufficient to impair the integrity of the claim on page 17 of the brief that—

> It is a significant fact that in all this legislation, covering a period of twenty years, and comprising thirty-three different acts upon the same general subject, Congress should have departed from a uniform rule of providing for reversion or forfeiture of unearned lands in only *three* instances, above recited.

If Congress had wanted to destroy by section 9 the right of declaring a forfeiture that arose by operation of law from the terms of the grant as expressed in section 8 and substitute for it something entirely foreign to it, then certainly in an act, which the brief says (p. 18) is "among the most elaborate and carefully drawn of all the railroad acts," it would not have provided for a *further* condition to destroy the effect of those already reserved, but would have said, instead of what was said in sections 8 and 9, substantially this:

> *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon condition that the said company shall commence the work on said road within

> two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini, eighteen hundred and seventy-six, and if there be a breach of any of these conditions, and the same shall continue for upwards of one year, then, in such case, at any time thereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

If Congress and the railroad company (which doubtless drew the act) were so anxious to attract capital, as is argued on pages 18 and 19 of the brief, by giving assurance that there could be no forfeiture, and that there was no "*possibility of the enterprise being eventually* hung up in the air," they took a very blundering way, and left standing prominently one of the best understood common-law rights to terrify capitalists—a right not impaired by any language of the act until seen in the light of a most ingenious argument by eminent counsel. It seems to have been misconstrued, and very naturally, by those whose timidity it was intended to allay, for of all things connected with this road the most striking is that it never had any effective financial backing.

The brief (pp. 19, 20) sets out in parallel columns certain sections from this act, and that of July 13, 1866, which are similar, with the exception that in the latter the *further* condition is that the title "shall revert to the United States." It is asked if anyone can say they mean the same thing. The inferential argument is that,

inasmuch as both acts, after granting in one section on conditions, provide in the next section for a further condition, which, in the one instance, provides for further legislation, and in the other for reversion of title, it could not be that in the Atlantic and Pacific act there could be a forfeiture under section 8. This assumes that there could not be a forfeiture under section 6 of the Placerville and Sacramento act on account of the *further* condition in section 7 of that act. This is not conceded. That act is not here for construction, and has not been construed. It will not help the court to construe the Atlantic and Pacific act to construe the other act. If it were here for construction, it would be contended that a right of forfeiture does exist under section 6, and that the further condition in section 7 is something in addition, viz, *an absolute reversion of title to the United States, which supervenes by operation of law*, at a fixed time and without any further legislative declaration of forfeiture by Congress. Suit could have been at once instituted by the Attorney-General.

In respect to the *further* condition being cumulative, there is no difference in the acts.

The maxim *expressio unius exclusio alterius est* is relied on (brief, p. 21), but this does not apply when rights are set up under Government grants and against the Government.

The maxim *fortius contra proferentem* is reversed where a question arises on the construction of a grant from the Crown, for such grant is construed most strictly against the grantee and most beneficially for the Crown, so that

nothing will pass to the grantee but by clear and express words; and this excludes the application of either of the maxims *expressum facit cessare tacitum* or *expressio unius est exclusio alterius*. That which the Crown has not granted by express, clear, and unambiguous terms, the subject has no right to claim under a grant or charter. (Broome's Legal Maxims, 8th ed., p. 607.)

II.

ALTHOUGH THE GRANT TO THE ATLANTIC AND PACIFIC COMPANY WAS A CONTRACT AS WELL AS A LAW, THERE WAS NO BREACH OF ANY OBLIGATION RESTING UPON THE GOVERNMENT WHICH DEPRIVED IT OF THE RIGHT TO DECLARE A FORFEITURE.

The contrary of this proposition is insisted on in plaintiff in error's brief (pp. 21, 26).

Extinguishment of Indian titles.

It is contended that the Government agreed to extinguish the Indian titles in the *Indian Territory* and survey the lands; that it failed to so do; that for this reason the company had to cease building, and that for this breach of duty on the part of the Government a forfeiture could not be declared.

By section 2 the right "of way through the *public lands*" and "to take from the *public lands* earth," etc., was granted.

By section 3 lands were granted in "the Territories of the United States and in States" whenever "*the United States have full title not reserved, sold, granted, or otherwise*

appropriated and free from preemption and other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever *prior to said time* any of said sections or parts of sections shall have been granted, sold, *reserved*, occupied by homestead settlers, or preempted, or *otherwise disposed of*," etc.

No lands were granted in the Indian Territory. They were not *public lands* within the meaning of the act. They had been "reserved," "otherwise appropriated," and were subject to "other claims or rights" within the meaning of the act. (*Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 742.)

In this case the court (p. 744) distinguishes between Indian territory "occupied by wild tribes" and "a reservation secured by treaty and occupied by Indians at least partially civilized."

The case of *Buttz* v. *Northern Pacific Railroad* (119 U. S., 55) does not conflict with the Leavenworth Case, for in the Buttz Case the lands in question were merely "occupied" by Indian tribes (pp. 58, 66). The act in question obligated the United States to extinguish the Indian titles to all lands "falling under the operation of this act and acquired in the donation to the road" (p. 58). The Indian title was extinguished to the lands in question in the Buttz Case prior to the filing of the map of definite location (p. 61). The court distinguishes between lands "occupied" by Indians and those "reserved" (p. 70).

Even if it be conceded that there was intended to be a grant of lands in the Indian Territory, the Government assumed no *absolute* obligations in respect of extinguishing titles to Indian lands. The provision in section 2 is as follows:

> The United States shall extinguish, *as rapidly as may be consistent with public policy and the welfare of the Indians*, and *only by their voluntary cession*, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

Congress reserved to itself to judge what was "*consistent with public policy* and the *welfare of the Indians*," and no court can substitute its judgment on these questions for that of Congress. The company took all the risk as to what Congress might do. Besides, the extinguishment was only to be by *the voluntary cession of the Indians*. This precludes absolutely the idea of a fixed obligation on the part of Congress.

These are not new questions. They were fully presented to and considered by the Forty-eighth Congress, when the act for the forfeiture of this grant was under consideration.

In the report made May 28, 1884 (House Report No. 1663, Forty-eighth Congress, first session), the Committee on Public Lands said:

Obligation of the Government in regard to Indian title.

> It is asserted by the attorneys of the company that the Government obligated itself, by the granting act, to extinguish the Indian title and survey the lands in the Indian Territory, and they claim that both

were indispensable to the complete utilization of the grant by its beneficiary. The realization of aid from the grants pledged by Congress to secure the construction of the road, and the possibility of reimbursement by profitable carrying trade in the operation of a constructed road, were necessarily dependent upon the promised change in the legal conditions of the land titles along the prescribed route of the proposed road. They insist that the United States has not even *attempted* to fulfill its promise to extinguish the Indian titles.

All this is insisted upon with a pretended belief that it is based upon a fair construction of the granting act. The general route of the road, as prescribed by this act, runs from the west line of the State of Missouri for 350 miles through the Indian Territory, which was prior to said grant set apart by the Government for the benefit of the Indians. The ultimate fee is vested in the United States, but which, by treaty stipulations, statutory enactments, and executive acts thereunder, have been set apart and reserved for the sole use and occupancy of certain Indian nations and tribes so long as their national or tribal organizations are preserved. The boundaries of this section of country are defined by various treaties with these nations and tribes and by legislative acts which prescribe the limits of the contiguous States and Territories of the Union. The public land system has never been extended over it. Congress has never taken any action to have it surveyed as public land. Much of it is held by four nations, the Choctaw, Chickasaw, Cherokee, and Creek, who have patents in accordance with treaties and laws, and all attempts to induce Congress to organize it into a Territory of the United States have, up to this time, failed.

This is enough to show that the company has no grant of land in this Territory, neither present nor prospective, in our opinion. None was intended to be conferred by the act, except as such grant might be acquired from the Indians by said company. Let us examine the granting act for a moment.

The pretended claim of the company for the survey of the lands in this Territory is based upon the fourth and sixth sections of the act. If these sections stood alone and could be considered by themselves, or in connection with only the last clause of the second section; if there were no limitations to the grant as made by the third section, and if the seventeenth section was no part of the law, there might be some plausibility in the claim that the fourth and sixth sections required that the lands be surveyed as fast as the road was completed. But if we consider the law as a whole, as enacted, the claim is without foundation.

Under the third section the land to pass under the grant must be public land, situated in a Territory or State, the title of which is in the United States, and which has not been sold or otherwise appropriated at the time the map of location of the route of its road is filed in the General Land Office.

The lands in the Indian Territory are not public lands in the usual meaning of that term, and are not situated in a State or Territory of the United States. Certainly the United States, so far as the lands within the boundaries of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations are concerned, does not possess full title to them; for they were, prior to the year 1866, the date of the granting act, set apart and reserved by the United States for the sole use and occupany of various Indian nations and tribes. Therefore the claim that these

lands were included in the grant under the third section can not be maintained.

Your committee is of the opinion, after a careful examination of the whole act, that no land was granted to the company in the Indian Territory except such as might be acquired by the company from the Indians by virtue of the seventeenth section. This section authorized the company to accept any grant from an Indian tribe or nation through whose reservation its road might pass, subject to the approval of the President of the United States. This is the privilege conferred by the act, and we believe that the last clause of the second section only becomes applicable when this is done:

And "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

The company at the beginning acted upon this construction of the law. This is fully shown by the files of the Interior Department.

It asked permission of the Interior Department, and leave was granted, to open negotiations with some of the Indian tribes to effect a grant of lands, but was not successful in its efforts with the Indians. Thus the company by its acts admitted that there were no lands granted to it other than the right of way which was provided for in the treaties between the Government and the Indians.

The company never set up any claim that it received any land by the grant in the Indian Territory until in the year 1877—eleven years after the act was passed.

The Interior Department holds that no lands were granted to this company in the Indian Terri-

> tory. This has been the uniform ruling of that Department on the subject. It was the ruling of the Hon. J. A. Williamson while he was Commissioner of the General Land Office, who is now attorney for the company.
>
> Your committee therefore finds that there is nothing in the claim of the attorneys of the company that the Government has failed in extinguishing the Indian titles and surveying the lands in the Indian Territory, as no grant of land was made to the company in said Territory.

This view was adhered to in a report to the Forty-ninth Congress on the same subject. (See Rec., pp. 341–343.)

The contention on page 25 of plaintiff in error's brief is as follows:

> The time of such fulfillment was from questions of public policy and from considerations looking to the welfare of the Indians, coupled with a reserved discretion in the grantor; but so long as that discretion was exercised and performance withheld, the United States was not in position to assert a right of forfeiture. In other words, so long as fulfillment by the company remained impossible because of the failure of the United States to keep their promises, no matter for what reason, so long the power to insist upon performance by the railroad grantee was postponed.

If this contention be sound, then the right of Congress to forfeit depended upon the will of the Indians, and if they would not agree to a voluntary extinguishment of title, the Atlantic and Pacific road had a nonforfeitable grant.

The brief (p. 23) says:

> Independent of the immense proportion of the grant situate along the line of its 350 miles in the Indian Territory, and independent also of the several million acres of lands within Indian reservations, existing west of the Indian Territory, at date of the grant, the United States have embraced along the line of actually constructed road more than two and a half million acres within enlarged or wholly new reservations. (Rec., 302, 303.)

The Cheyenne and Arapaho reservations were in the Indian Territory, and as shown, the railroad company was granted no rights within the Territory except by the voluntary consent of the Indians.

Besides, when the granting act was passed, July 27, 1866, there existed a treaty between the United States and these tribes of Indians by which these lands were set apart for those tribes. (See Revision of Indian Treaties, p. 123, art. 2.)

The treaty of July 25, 1868, embraced substantially the same lands. (Idem., p. 130.)

By treaty proclaimed September 24, 1850, the territory of the Navajoes was annexed to New Mexico. They were in possession of this territory, and it was Indian country. This treaty recognized their right of possession, the right of conferring safe passage being reserved "through the territory of the aforesaid Indians."

By article 9 of that treaty the United States agreed to "designate, settle, and adjust their territorial boundaries."

By the treaty of July 25, 1868, referred to on p. 303 of the record, this territory was adjusted, and the former

treaty was made the foundation of the new treaty. (See Revision of Indian Treaties, pp. 525, 526, 527, 528.)

Regardless of treaties, the Government had a right to make reservations prior to the filing of the map of definite location of the Atlantic and Pacific Company, for it could dispose of any lands within the grant prior to such time.

If they undertook to dispose unlawfully of any land after the rights of the railroad company attached, such action would be void and furnish no excuse to the railroad company for not building its road. Such action would not be a violation of any agreement or covenants made by the Government upon which the right of forfeiture depended, but an independent wrong, an unconstitutional attempt to take the railroad's property.

It is a remarkable fact that every one of these reservations referred to in the brief (p. 23) as excuses for not building the road are opposite portions of the road which were actually built, and none of them affect in any way the lands coterminous with the unconstructed portion. (See map, Exhibit D, between pp. 284 and 285 of the record.)

The railroad company knew the route of the road, the character of the country, the nature of the Indian titles, and the difficulties in surveying when it took the grant. It went into the enterprise with time limitations for building, under the penalty of forfeiture, and took no covenant in respect of these things under which the time could be extended.

The reasons given now for not completing the road are somewhat different from those given in the report made

by the Atlantic and Pacific Company to the Secretary of the Interior in 1876, which contains the following:

> It was believed that public policy and the welfare of the Indians required the extinguishment of the Indian title to the lands within the Indian Territory immediately after the passage of the act, and that legislation should provide for the development of the Territory by the admission of white settlers, with proper regard for permanently established homes for the Indians on their lands held in severalty under titles inalienable and under a government which would protect them in their every right and promote civilization. The failure on the part of the United States to extinguish the Indian title to the lands granted to this company, to provide a good government for the Indians, and to open the Territory for occupancy by white people, compelled this company to suspend the construction of its line beyond Vinita, to which point it was opened nearly five years ago. The route westward from its present terminus, on a line carefully surveyed and located at great expense to San Francisco, lies through the Indian Territory a distance of 300 miles, and the conditions under which the Territory now exists practically forbid the further prosecution of the enterprise. The political and moral influences in that vast, rich section of country will not permit the utilization of a soil and climate unsurpassed on the continent.
>
> The Indian Territory is not only substantially undeveloped, but by existing law and under the policy of the Government hitherto pursued it must remain for an indefinite period practically a wilderness. Its vast area is inhabited only by Indian tribes. The lands are held by them in immense tracts common to all the members of the tribe.

> These conditions, together with the protracted prostration of the mineral industries in Missouri, on which this company largely depended for its revenues, and the destruction of the cereals in Missouri and Kansas by the grasshoppers, thereby seriously reducing the business of the Pacific Railroad (of Missouri) held by this company under lease, as heretofore reported, caused the Atlantic and Pacific Railroad Company to yield to the inevitable consequences and pass into the hands of a receiver in November 1875. (See appendix.)

The failure to get titles extinguished to lands claimed to be granted in the Indian Territory is made very prominent in the testimony of J. A. Williamson, *Land Commissioner of the Atlantic and Pacific Company.* (Rec., pp. 295, 302, 303.)

This is the same gentleman who, when *Land Commissioner for the United States*, in a very able and conclusive paper addressed to the Secretary of the Interior in regard to the identical claim now urged by the Atlantic and Pacific Company, held that "lands in the Indian Territory are not public lands in the usual meaning of the term, and are not situated in a State or Territory of the United States" (Rec., p. 291), and that "no grant of lands in the Indian Territory was contemplated by the act except such as might be acquired by the company from the Indian holders and occupants by the terms of the seventeenth section:"

> That the said company is authorized to accept to its own use any grant * * * by any Indian tribe or nation through whose reservation the road herein provided for may pass, etc. (Rec., p. 291.)

On page 292 he continues as follows:

That the company at the outset acted upon this construction of the law is fully shown on examination of the files of the Department, for I find therein a communication from Lewis Downing, principal chief of the Cherokee Nation, with which, under date of 6th December, 1869, he transmitted to your predecessor an official copy of a resolution adopted by the national council of the Cherokee Nation November 29, 1869, declining to comply with the request of the Atlantic and Pacific Railroad Company, formerly presented in a memorial "for a grant of land, aid and assistance in money, to facilitate the building of said railroad."

There is also a letter from Francis B. Hayes, esq., president of the company, to Secretary Delano, dated November 29, 1870, in which he says:

"Under its treaty with the Cherokee Indians the right of way is given to this company, representing the east and west road through the Cherokee Reservation, but the United States, though giving this company by its charter a right of way for the entire length of its road, has not secured for the company the right of way from the small tribes occupying that portion of the Indian Territory lying between Grand River and the State of Missouri, being a distance of about eight and one-half miles within the Indian Territory and immediately east of the Cherokee Reservation. * * * Having been permitted by the Secretary of the Interior to open negotiations with the small tribes of Indians occupying the land between Seneca, in Missouri, and the Grand River, in view of obtaining the right of way and other lands and privileges for railroad purposes, as authorized by its charter, this company finds a friendly disposition manifested by the Shawnee and Wyandottes to allow the company what is desired.

"I now have the honor to respectfully ask, in behalf of the Atlantic and Pacific Railroad Company, * * * permission to continue negotiations with the Indian tribes for the right of way, depot lands, and other privileges for railroad purposes, subject to your approval."

And further, the company filed a bond conditioned for the protection of the rights of the several Indian tribes through whose territory the line of the road was designed to pass, which bond was approved March 16, 1871.

It also entered into contract with the Shawnee and Wyandotte Indians for right of way through their reserves, and gave similar bond, both contract and bond being approved by President Grant, March 16, 1871.

These facts show that the right of way through the Indian Territory is guaranteed to the company by the treaties of 1866 with the Cherokees, Creeks, and Seminoles, and by the contract of 1871 between the company and the Shawnees and Wyandottes. In neither the treaty nor the contract, however, was a grant of land made by any of these nations or tribes, nor, until now, has the company ever claimed that it had a grant of land in the Indian Territory. On the contrary, its entire action heretofore has been in consonance with the construction of the law by which the United States is held to have agreed to confirm (within certain limits) such grant of lands as the Indian nations or tribes might make to the company, and to thereupon extinguish the Indian title to the lands so granted.

The company not having received any such grant, occasion for the extinguishment of the Indian title has not arisen, and consequently there is no reason for the survey of the lands in question, much less the issue of patent therefor to the company.

This entire paper is both interesting and instructive, and will be found on pages 288–294 of the record.

SURVEY OF LANDS.

It is contended that the right of the Government to declare a forfeiture was dependent upon a survey of the lands as a condition precedent, and that the lands were not surveyed in accordance with the agreement, and that for these reasons the forfeiture act was void.

The brief says (p. 25):

> The same reasoning applies to the provision to survey the lands, and possibly with greater force. There were no considerations of public policy to restrain the United States from making surveys where at least the lands were public. It was simply a failure to make the appropriations necessary to put the surveying parties in the field. It was a palpable omission to perform an agreed duty.

What was the provision in regard to surveys, the neglect of which has produced such grave consequences?

The sixth section is as follows:

> That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure

> homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

The survey was to be made after the fixing of the general route, "and as fast as may be required by the construction of said railroad."

The land was not to be surveyed as fast as may be required *for* the construction of said road. The survey was to follow, or at most go *pari passu* with construction. It was for the benefit of the United States and the grantee company to indentify the lands for purposes of sale, it being presumable that they would come into market by the construction of the road. But this provision was in no sense a covenant or condition. It was a direction to the President of the United States. No condition in the grant was expressly or impliedly dependent upon it.

The company certainly did not suffer through not being able to identify its lands, for it promptly put mortgages on all of the lands from Albuquerque to Missouri, its Central Division, as early as 1871, although it never built a foot of road between Albuquerque and the Indian Territory. (Rec., p. 112.) It floated bonds on its entire road aggregating thirty millions of dollars. (Rec., 112.)

The brief (p. 25), speaking of the failure to survey, says:

> It was even more indefensible because the railroad company offered to put up the money for such surveys, which offers the United States refused to accept.

This offer was not made until 1881, at which time the Atlantic and Pacific Company, bankrupted and practically sold out, had forfeited all right to build the road, section 8 of the act having provided for its completion by July 4, 1878. Very satisfactory reasons for refusing the deposits for surveys appear in the decisions of the Commissioner. (Rec., pp. 260, 261, 285, 287.)

To support its contention, that the Government lost its right to declare a forfeiture by a failure to survey, the case of *Davis* v. *Gray* (16 Wallace) is cited in the brief (p. 26), and a passage from page 230 is quoted as conclusive of the question.

That was a case in equity. In that case the State of Texas was, through its officer, setting up the forfeiture. The court said (p. 220) that, while the State was not an actual party, the court could proceed to decree against its officers in all respects as if the State were a party to the record. The court held that the State, by affirmative action, had prevented compliance with the conditions subsequent (p. 230), and that it had waived the breach (p. 232). As the parties in original interest, the vendee of the grantee company and the State, by its officer, were before the court, it was held that a reasonable time could be given for performance, and that: "Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred" (p. 231).

This is a suit at law, and the parties are the Atlantic and Pacific Company and a grantee of the Government. There is no room for a play of equitable principles. It is a matter *stricti juris*. The parties can not be "put in the same situation."

III.

THE RIGHTS RESERVED TO THE UNITED STATES WERE NOT SUBORDINATED TO ANY RIGHTS OF THE ATLANTIC AND PACIFIC COMPANY BY THE ACT OF APRIL 20, 1871.

The right to forfeit existed under the act of 1866, and it was not taken away by the act of 1871.

The brief says (p. 26):

> If it had been the intention of Congress that upon such existing default construction should cease and the enterprise terminate, it would surely have legislated in this act of 1871, in unambiguous terms, for the resumption of the grant, or *upon the continuance* of such right of resumption, if that was the reserved power in the act of 1866.

If the right existed, it was not necessary to legislate "*upon the continuance of such right.*" Having once vested, it continued until there was legislation against it.

There is nothing whatever in the act of 1871 which affects the relations which existed between the Government *and the railroad company* in respect of forfeiture. *The rights conferred are upon the mortgagees, and them alone.* They could waive them or refuse to set them up, and the Atlantic and Pacific Company could say nothing. Giving the act its largest interpretation in behalf of the bondholders, it confers no scintilla of right on the Atlantic and Pacific Company.

IV.

THE ATLANTIC AND PACIFIC COMPANY HAS NO LEGAL TITLE, AND CAN NOT RECOVER.

This is a suit at law—an action of ejectment—a trial of legal title, in which the plaintiff to prevail must show a good legal title.

Though, upon the authority of *Schulenburg* v. *Harriman* (21 Wall., 44), *Deseret Salt Co.* v. *Tarpey* (142 U. S., 241), *United States* v. *Southern Pacific R. R. Co.* (146 U. S., 595), and other cases, the title to the land in question vested in the Atlantic and Pacific Company upon the filing of the map of definite location, yet this title was subject to forfeiture for breach of conditions subsequent.

This forfeiture has taken place, and this legal title has been destroyed. The validity of the act of Congress in forfeiting this grant to the Atlantic and Pacific Company must be determined by the reciprocal rights of the grantor and grantee, and *not by rights vested in others.*

The recovery must be on the strength of the actor's legal title. It can not rely on the title or equitable right of someone else. The preservation of all of the rights of the bondholders under the act of 1871 is perfectly consistent with the forfeiture of the legal title of the Atlantic and Pacific Company and its revestiture in the United States. The United States can hold the title subject to the rights of the mortgagees just as well as the railroad company can.

The rights of the parties in this suit can be determined without considering in any way the rights of the bondholders and the United States, who are not parties.

V.

MEANING OF THE ACT OF 1871.

The act in question is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seventh, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the Office of the Secretary of the Interior: *Provided*, That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, *the rights of those claiming under any mortgage* made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.
>
> Approved, April 20, 1871.
>
> (17 Stat. L., pp. 19, 20.)

It is contended, in effect, that Congress, with full knowledge of the conditions in the act of 1866 and the provisions for forfeiture if the road should not be completed by 1878, meant by the act of 1871 to put it in the power of the company to issue bonds payable in a thousand years or more, and in the power of the mortgagees not to foreclose until the millenium, and thus extend forever the right to build the road, and for all practical purposes shut out in perpetuity the right of the Government to again grant these lands, whether the road was ever built or not.

It follows logically from the contention that, from the passage of the act of 1871, the Atlantic and Pacific Company could, by a bond and mortgage, and without ever building a mile of road, withdraw from the public domain the perpetual usufruct of the lands which the Government devoted for the purposes of building a transcontinental road.

Not only the conditions in section 8, but that in section 9 and the reservation in section 20 are thus destroyed. All of this is said to be accomplished without any express reference to these terms in the former act. This case emphatically calls for the application of the settled rule that those claiming rights against the Government must stand upon express provisions.

In *Dubuque and Pacific Railroad Co.* v. *Litchfield* (23 How., 88), the court said:

> *But if we had doubts from any obscurity of the act of Congress, a settled rule of construction would determine the controversy.* All grants of this description are strictly construed *against* the grantees; nothing

passes but what is conveyed *in clear and explicit language;* and as the rights here claimed are derived entirely from the act of Congress the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; *and if not thus expressed, they can not be implied.*

In *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 740), the court said:

> This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. *If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor. And if rights claimed under the Government be set up against it they must be so clearly defined that there can be no question of the purpose of Congress to confer them.* In other words, what is not given expressly, or by *necessary* implication, is withheld.

In *Coosaw Mining Co.* v. *South Carolina* (144 U. S., 562), the court said:

> The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the Government or the public has an interest.

> * * * Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; *nothing passes by mere implication.*

The plain purpose of the act of 1871 was far from what is contended. The proviso distinctly recognizes that the conditions were still to be in force, and contemplated forfeiture under them. If it contemplated forfeiture for noncompletion, then certainly it did not at the same time mean to have a completion after a forfeiture for noncompletion. Upon a forfeiture for a breach of the conditions made after the act of 1871 the powers of the company to build ceased, and it could not by construction thereafter earn back what had been forfeited to the United States.

If this be so, then what the proviso meant was that the mortgage might cover all the lands, but if there were any breach thereafter the Government might declare a forfeiture, and in such event the rights of the bondholders should, notwithstanding the forfeiture as against the company, extend to the lands coterminous with the road completed at the time of forfeiture, the time at which construction must cease. Their rights were determined, so far as the lands were concerned, as of the time of forfeiture. It can not be held that the words "at the time of the foreclosure" mean anything else, unless it be held that they, by implication, destroyed altogether the rights of the Government to forfeit for breach of conditions, or be given the strained meaning that after forfeiture the right to build and earn back the lands continued the same as if there had been no forfeiture.

Repeals by implication are not favored. There could be no better reason for the rule than that furnished by this contention, under which the right to many millions of acres of land is sought to be destroyed *by implication alone.*

According to the contention there might have been a forfeiture declared before a mortgage was executed, and yet bondholders could, regardless of such forfeiture, set up rights to land coterminous with the road thereafter constructed, for the proviso does not say breach after the mortgage is made, but "hereafter"—that is, the time of the passage of the act. The contention of plaintiff in error can not be sustained without giving such force to the words "at the time of the foreclosure of said mortgage" as to make the proviso read:

> *Provided*, That, notwithstanding the conditions in the granting act, the company may continue to build the road, and thereby retain its title to the granted lands until the bondholders shall see proper to foreclose said mortgage, and, if at the time of such foreclosure there has been a breach of any of said conditions, the Government may forfeit for such breach, but only in respect of lands not coterminous with portions of the road constructed by that time.

To enforce the contention in favor of the sweeping effect of the words "at the time of the foreclosure of said mortgage," the brief (p. 29) has the following:

> It is, however, obvious that if those concluding words of the law of 1871 are treated as surplusage, then that entire act must equally be treated as surplusage. This follows, for the reason that, if those concluding words do not take on their legal meaning, the whole act is meaningless; it has effected

> nothing that did not quite as plainly and lawfully exist before it was enacted. The 1866 grant of lands was *in præsenti*. The company was not only fully empowered to sell its title thereto, but it had equally a common-law right to mortgage them. To raise money for construction was the very purpose of the grant, and those moneys could be as well raised by pledge as by sale of the land subsidy.

While it is now elementary law in railroad land grants that the title passed upon filing of map of definite location, it was not so generally accepted when the act of 1871 was passed.

The case of *Schulenberg* v. *Harriman* (21 Wallace, 44), which was the first case in which the doctrine was declared that a grant of land to aid in railroads was one *in præsenti*, was not decided until 1874.

In that case the grant was to the State of Wisconsin, and there was no question as to the effect of filing a map of definite location.

The doctrine was announced for the first time in 1875 in *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 741), but was not called for. It was repeated in 1878 in *Missouri, etc., Ry. Co.* v. *Kansas Pac. Ry. Co.* (97 U. S., 496). The question was first squarely decided as a litigated point in 1882 in *Van Wyck* v. *Knevals* (106 U. S., 364).

The assertion that the company could mortgage its lands without the act of 1871, while a legal truth, was not so known and accepted as to warrant the argument that neither the railroad nor Congress in 1871 would have sanctioned such an act, unless it was meant to secure more than the law then actually warranted.

But while it could mortgage, the rights of the mortgagees would stand no higher than those of the mortgagor, and *all* of these rights were subject to forfeiture for the nonconstruction of the road as provided in the act. By the act of 1871 the forfeiture was waived as to lands opposite road constructed up to the time the company's right to construct farther was cut off, and therefore the above statement in the brief that the act of 1870 "is meaningless" unless the construction contended for by the company be adopted is manifestly erroneous.

The act was entirely for the benefit of the railroad company. The presumption is that it prepared the act.

In *Slidell* v. *Grandjean* (111 U. S., 437), Mr. Justice Field said:

> It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, *or the relinquishment of a public interest*, and there is a doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. *As a reason for this rule it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to.* The rule has been adopted and followed by this court in many instances in the construction of statutes of this description.

If it was known to the company that without the act it could mortgage its lands, then the conclusion seems irresistible that under the guise of giving to the financial world a legislative assurance of what was believed to be

the law in respect of the filing of maps of definite location, but had not yet been authoritatively declared, an act was artfully contrived by which thereafter, through ingenious construction, well-established and clearly defined rights of the Government over a vast domain were to be entirely destroyed or indefinitely postponed to await the pleasure of bondholders.

The brief seems to regard it as impossible that Congress should pass an act merely declaratory of the law, although such legislation is entirely familiar, and it has never been adopted as a canon of legislative construction that a court must give force to words in an act merely on the ground that without such construction it would be merely declarative of the law as it existed.

But the contention in the brief is still more radical. It is, though put interrogatively, that, by the act of 1871, Congress exercised the power, reserved by section 20, to "add to, alter, amend, or repeal" the act, and did "alter" it, so that all of the reserved rights of the Government were practically destroyed.

The brief (p. 30) says:

> The mode prescribed by section 20 of the act of July 27, 1866, for the exercise of whatever reserved power the Government possessed was that "Congress may at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."
>
> Very clearly the 1871 act was not a "repeal" of the 1866 law, so *that* reserved power was not exercised. *Non constat* that it was intended to "add to" or to "amend." *Why may it not have been the legislative purpose to "alter" the original contract?*

It would be hardly possible to find a case where so much was claimed to be accomplished by implication, and where such recklessness is imputed to Congress. It is inconceivable that Congress could have intended such far-reaching results without imputing bad faith to it.

The supposed address of the bondholders to the company, set out on page 31, lacks something. It should proceed:

> And you must get the Government not only to give priority to our lien, but to put it in our power to continue, by not foreclosing, the time for constructing the road indefinitely, and then we can get together and put a mortgage on the lands of insignificant proportions, and wholly inadequate to build the road, with the bonds maturing at a very remote period and no interest to be paid until maturity. Thus we can, by a reciprocal regard for the interests of each other, withdraw these lands from sale, hold them in our grip until the country settles up and they, by means of the "unearned increment," become immensely valuable, and then we can construct the road and sell this princely domain. It will make no difference to us that in the meantime the Government has not secured the road it intended for the transportation of troops and mails, and that it has not realized its expectation of enhancing by the building of the road the value of its reserved lands. But above all be sure not to make these things patent in the act. Make no express repeal of the reserved rights of the Government. Contrive so artfully that these results will not appear, but can hereafter be achieved by the construction which we will insist must be put upon the act.

The brief says (p. 32) that the United States agreed to all this, because "it was especially desired that this road should be built. *Construction of the road* was the objective point of legislation."

The road never was built. Can the idea be entertained for a moment that the paramount desire of Congress was to have the road built, and yet that it deliberately, and with eyes wide open as to what it was doing, gave up all present rights to forfeit for not building, and to legislate under section 20 to secure the building, and put it in the power of the railroad company and its bondholders never to build it, and place them in a position to stand in court in 1896, eighteen years after the period fixed for the completion of the road, and claim that the Government has no control over these lands, and that it never can have any control until the bondholders shall graciously foreclose and permit it then to reenter upon the lands coterminous with the portions of the road then unconstructed?

The brief has one statement which no one can confute, if Congress meant what is claimed. It is, "*Termination* of the enterprise was not contemplated." (Brief, p. 32.)

This is absolutely true. The enterprise is *interminable* if the construction contended for be put on the act of 1871. But how this is reconcilable with the quotation from 91 U. S., 80, with which the argument is reenforced, to the effect that the "enterprise was viewed as a national undertaking for national purposes," is somewhat staggering. A national undertaking for national purposes is proposed to be converted into a private undertaking, over which the Government has abandoned all control, and for private purposes.

The brief (p. 32) says that the Government deliberately rested the right to exercise its powers upon the action of the mortgagees, assuming "that the mortgagees would intervene for their own protection and would see that their security was made good by construction. It further assumed that a foreclosure of their mortgages would be evidence that both the company and its mortgagees had abandoned the work, and in such event it provided that the United States *could then see to the intended application of the residue of lands not coterminous with construction.*" Could a great Government be put in a more helpless and ridiculous position in respect of a national enterprise?

On page 33 of the brief the action of the Government in postponing its lien on the Union Pacific Railroad is cited as equivalent legislation, and therefore tending to diminish the shock of the contention in this case. The two are essentially different. This act, as it is proposed to be construed, provides for never building the road, while the mortgage on the Union Pacific secured the building of, and only took effect on, constructed road. It did not cover lands, and the United States reserved no lien on lands.

The insistence that section 10 of the Union Pacific act (13 Stat., 356) "waived *pro tanto* the forfeiture of the whole of all of said railroads," etc., is somewhat obscure.

There is a waiver of forfeiture in section 7, which relieved one company from the default of other companies, but that has no relevancy to this question.

It is said in the brief (p. 34, 35) that there is no force in the argument that the contention for the plaintiff in

error means an indefinite postponement of the rights of the Government, and that "if the obligation secured by the first mortgage has matured and the mortgagor is neither making efforts to pay it off nor the mortgagee to enforce his lien, an undoubted right rests in the second mortgagee to intervene and compel foreclosure."

This graciously gives the Government an opportunity in 1910 (Brief, p. 35) to come in and look after a national undertaking which was to have been completed in 1878. In 1910 it may be insisted that the Government is not a second mortgagee and has no lien; that it is bound by the strict language of the act *as construed* and has surrendered all right to intervene until foreclosure, and that no one but a second mortgagee has a right to redeem a prior mortgage or insist upon foreclosure.

It is also said, on page 35 of the brief, that the United States might invoke the doctrine of trusts, in the event the construction of the road should not proceed *bona fide*. It would be hard to fix a basis for determining the *bona fides* if the limitations fixed by the granting act are wiped out. But after all, according to the brief, the United States gave up all of its rights under the granting act until foreclosure, had no remedy left by statute, and was relegated in respect of this great national undertaking to the condition of an ordinary suitor, depending alone on the more than doubtful assumption that they stood in the position of a second mortgagee, or the uncertain application in this case of the doctrine of trusts. To say that Congress meant this is just as unreasonable as to say that it intended to leave the Government remediless.

That the Atlantic and Pacific Company construed the right to mortgage in a very large way is evidenced by the fact that in 1871 it put a land-grant mortgage on the Central Division, which covered the lands here in question, which would mature in 1901, and subsequently, in 1882, four years after the time allowed for construction had expired, put a so-called first mortgage on the same division to secure bonds which were to take up those under the land-grant mortgage, and which were not to mature until 1922, thus extending the maturity of the debt for twenty-one years beyond the time fixed in the first mortgage. Rec., pp. 112, 124, 157.)

VI.

THE FORFEITURE ACT OF 1866 WAS VALID AND FORFEITED THE RIGHTS OF THE ATLANTIC AND PACIFIC COMPANY.

The brief (p. 36 et seq.) contends that "a mere legislative declaration is not valid so as to effectuate" the forfeiture of these lands, and that "some proceeding which shall have a semblance of 'due process of law' must follow to determine the rights involved so as to divest the title of the grantee and to reinvest it in the grantor."

For more than thirty years the contrary doctrine has been declared by this court. In *United States* v. *Repentigny* (5 Wall., 211, 267), the court said:

> The United States succeeded to all the rights to this territory that existed in the King of France, under the treaty of 1783, with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and

were thereby invested with the power to deal with the seigniorial estate, the same as the King of France, had it continued under his dominion; and we agree that before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under the authority of the Government, without these preliminary proceedings. In the present instance we have seen the laws have been extended over this tract, the lands surveyed and put on sale, and confirmed to the occupants or purchasers, and in the meantime an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found.

In *Schulenberg* v. *Harriman* (21 Wallace, 44, 63), it was said:

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach

of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation or by taking possession directly under the authority of the Government without these preliminary proceedings."

In *Farnsworth et al.* v. *Minn. & Pac. R. R. Co.* (92 U. S., 49, 66), the court said:

> A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for noncompliance with the conditions annexed to their grant or to their possession when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the

ownership of the State, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object—will be equally effectual and operative. It was so decided in *United States* v. *Repentigny*, 5 Wall., 211, and in *Schulenberg* v. *Harriman*, 21 Wall., 44, with respect to real property held upon conditions subsequent.

In *McMicken* v. *United States* (97 U. S., 204, 217), the court said:

> This court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands which have become forfeited. It was so held in *United States* v. *Repentigny's Heirs* (5 Wall., 211); *Schulenberg* v. *Harriman* (21 id., 44), and *Farnsworth* v. *Minnesota and Pacific Railroad Co.* (92 U. S., 49). In Repentigny's Case, the court says: "The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the Government. It may be, after judicial investigation, or by taking possession directly, under the authority of the Government, without these preliminary proceedings. In the present instance, we have seen the laws have been extended over this tract, the lands surveyed and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found." The same doctrine was applied, in the case of Farnsworth, in relation to a grant of lands and privileges for the construction of a railroad.

In *Van Wyck* v. *Knevals* (106 U. S., 360, 368), the court said:

> If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress.

The brief (p. 38) says:

> And where this court has heretofore recognized the power to proceed by direct legislative declaration, the operation of that right has uniformly been restricted to cases where the granting act in express terms reserved the authority to so declare a forfeiture. (*Farnsworth* v. *Minn. & Pac. R. R. Co.*, 92 U. S., 66.)

The doctrine does not rest on any such ground. In the case of *Schulenberg* v. *Harriman* (21 Wall.) the act reserved no right to declare a forfeiture. It provided for a reversion of title.

The court said (p. 62, 63) that this was no more than a condition subsequent, and that the Government would have to take some affirmative action by legislation or otherwise to recover the title.

The same was true of the act in the Farnsworth Case. In that case the court (p. 67), in referring to the other cases, says they were decided "with respect to real property held upon conditions subsequent," thus putting those acts which had a provision that the title should revert upon the same footing as those containing a mere condition subsequent.

CONCLUSION.

While it is insisted that the judgment should be affirmed, nevertheless, if upon this record the court should be of a contrary opinion, it is respectfully suggested, in view of the large interests of the Government and its patentees, who were not represented in the preparation of the case and may be indirectly affected, that the decision be limited as far as practicable to the particular facts presented and the questions absolutely necessary for its determination.

J. M. DICKINSON,
Assistant Attorney-General.

APPENDIX.

ACT OF CONGRESS.

ATLANTIC AND PACIFIC GRANT.

July 27, 1866 (14 Stat., 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most elegible railroad route, as shall be determined by said company, to a point on the Canadian River; thence to the town of Albuquerque, on the River Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

"SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a

railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office,

and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And further provided*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And further provided*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'"

"SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall

appoint three commissioners, to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and improved description, to be operated along the entire line: *Provided*, That the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad

which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms."

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preemption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, 1841, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domains,' approved May 26, 1862, shall be, and the same are, hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

"SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred seventy-eight."

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upward of one year,

then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

"SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

"SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to

the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void."

"SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard to the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

REPORT OF THE ATLANTIC AND PACIFIC RAILROAD COMPANY FOR THE YEAR 1876.

OFFICE OF THE
ATLANTIC AND PACIFIC RAILROAD CO.,
No. 3 Broad Street, New York.

The Hon. SECRETARY OF THE INTERIOR,
Washington, D. C.:

The Atlantic and Pacific Railroad Company, a railroad corporation created by and under an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Kansas to the Pacific Coast," approved July 27, 1866, makes this report as of June 30, 1876, to the Secretary of the Interior, as required by the act of Congress entitled "An act relative to filing reports of railroad companies," approved June 25, 1868, as follows, viz:

First. The names of the stockholders of the company and their places of residence as per the stock ledger of the company, June 30, 1876.

[A portion of the report is omitted in print, being considered not material in the discussion here.]

By the terms of the charter granted to this corporation by act of Congress approved July 27, 1866, it was provided, among other enactments, by section 2 of said act, that "the United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act." It was believed that public policy and the welfare of the Indians required the extinguishment of the Indian title to the lands within the Indian Territory immediately after the passage of the act and that legislation should provide for the development of the Territory by the admission of white settlers, with proper regard for permanently established homes for the Indians on their lands held in severalty under titles inalienable, and under a government which would protect them in their every right and promote civilization. The failure on the part of the United States to extinguish the Indian title to the lands granted to this company; to provide a good government for the Indians, and to open the Territory for occupancy by white people compelled this company to suspend the construction of its line beyond Vinita, to which point it was opened nearly five years ago. The route westward from its present terminous, on a line carefully surveyed and located at great expense to San Francisco, lies through the Indian Territory, a distance of 300 miles, and the conditions under which the Territory now exist practically forbid the further prosecution of the enterprise. The political and moral influences in that vast, rich section of country will not permit the utilization of a soil and climate unsurpassed on the continent.

The Indian Territory is not only substantially undeveloped, but by existing law and under the policy of the Government hitherto pursued it must remain for an indefinite period practically a wilderness. Its vast area

is inhabited only by Indian tribes. The lands are held by them in immense tracts common to all the members of the tribe. These conditions, together with the protracted prostration of the mineral industries in Missouri, on which this company largely depended for its revenues, and the destruction of the cereals in Missouri and Kansas by the grasshoppers, thereby seriously reducing the business of the Pacific Railroad (of Missouri), held by this company under lease, as heretofore reported, caused the Atlantic and Pacific Railroad Company to yield to the inevitable consequences and pass into the hands of a receiver in November, 1875. Its lease of the Pacific Railroad (of Missouri) was canceled through failure to pay rental therefor. Its mortgage on the lands in Missouri and its second mortgage on railroad and lands in Missouri has been foreclosed and the entire property of the company in Missouri and all rights, privileges, and franchises covered by its said foreclosed mortgages in October, 1876, have passed into possession of the St. Louis and San Francisco Railway Company, a corporation organized to purchase the said property and resume construction of the line westward to the Pacific as soon as the United States shall, in the language of the act of incorporation, do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Respectfully submitted.

ANDREW PEIRCE,
President.

ANDREW PEIRCE,
CLINTON B. FISK,
JOS. SELIGMAN,
JAMES D. FISH,
W. H. COFFIN,
GEO. F. STONE,
JAS. W. ELWELL,
Directors.

STATE OF NEW YORK,
County of New York, ss:

On the 5th day of October, A. D. 1876, before me personally appeared Andrew Peirce, Clinton B. Fisk, Jos. Seligman, James D. Fish, W. H. Coffin, George F. Stone, and James W. Elwell, directors of the Atlantic and Pacific Railroad Company, to me known, who, being by me severally sworn, did depose and say that the statements set forth in the foregoing certificate were true to the best of their knowledge and belief.

[SEAL.] FRANK SAUNDERS,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss.:

On the 5th day of October, A. D. 1870, before me personally appeared Andrew Peters, Charles R. Fisk, Jos. Seligman, James D. Fish, W. H. Clifton, George F. Stone, and James W. Flavell, directors of the Atlantic and Pacific Railroad Company, to me known, who, being by me severally sworn, did depose and say that the statements set forth in the foregoing certificate were true to the best of their knowledge and belief.

[SEAL.] FRANK SAYLES,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

165-413

165-413

OCT 22 1896
JAMES H. McKENNEY,

Number 100.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1896.

The Atlantic & Pacific Railroad Company,

Plaintiff in Error,

vs.

Robert Mingus.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR UNITED STATES.

JOSEPH H. CALL,
Special United States Attorney.

Chas. W. Palm Co. Print, Los Angeles, Cal.

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ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR UNITED STATES.

Statement.

It is suggested to the court that the United States are greatly concerned in the questions involved in this case. For more than ten years it has been understood by the government that the lands granted to the Atlantic & Pacific Railroad Company opposite the uncompleted parts of that railroad were forfeited to the United States and restored to the public domain by the act of congress of July 6, 1886, [24 U. S. Stats. 123] and those lands not earned and supposed to be forfeited by that act amount to about forty millions of acres.

If the claims of counsel for plaintiff in error should be sustained by this court it would appear that those forty millions of acres were not owned by the United States and were not restored to the public domain and the many patents issued by the United States and entries allowed to settlers for parts of such lands would in effect be nullified.

For these reasons, by direction of the Attorney-General, and by permission of the court the following considerations are presented:

The act of Congress of July 27, 1866, incorporated the Atlantic & Pacific Railroad Company to construct a line of railroad and telegraph for military, naval and other purposes of the United States from Springfield, Missouri, to the Pacific ocean, to pass through Albuquerque, New Mexico. [14 Stat. 292.]

To aid in the construction of the road, Congress granted to the company twenty sections per mile on each side of the line of railroad in the territories and ten sections on each side in the states through which such railroad might pass, with a right to select indemnity lands for losses in the place limits within a further limit of ten miles on each side of the granted lands.

It was a *condition of the grant* that not less than fifty miles of railroad should be completed each year after the second year, and that the whole of the road should be constructed, equipped and finished by July 4, 1878. [See section 8 of the act.]

By section 20 of the act, Congress expressly reserved the power to alter, amend or repeal the act at any time, having due regard for the rights of the company.

It is provided by sections 3, 8, 9 and 20 of said act of July 27, 1866, as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd num-

bers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said railroad is designated by a plat thereof, filed in the office of the commissioner of the general land office; and, whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; Provided further, that the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act; Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided; And provided further, that the word 'mineral', when it occurs in this act, shall not be held to include iron or coal; And provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

"SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic & Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act

by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, *Anno Domini* eighteen hundred and seventy-eight."

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic & Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"SEC. 20. And be it further enacted, that the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act."

Up to the year 1871, the Atlantic & Pacific company had constructed less than fifty miles of railroad upon the entire line between Springfield, Missouri, and the Pacific, and in that year the company, desiring to make a mortgage upon its railroad and lands to secure further funds to complete the road, applied to Congress for a special act authorizing it to make a mortgage covering its railroad franchises and lands.

The Atlantic and Pacific company was not authorized by the act of 1866, to mortgage or transfer or otherwise alienate the railroad or any of the franchises or rights to unearned lands granted by that act.

The consent of Congress was therefore indispensable to enable the company to make this mortgage and at the instigation of the company the act of April 20, 1871, was passed by Congress and which act must be presumed to have been drafted by the attorneys and agents of the company. This act is as follows: [17 Stat. 19.]

"*Be it enacted, etc.* - That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seven, eighteen hundred and sixty-six, is hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges and other rights and property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; Provided, that if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

By the act of July 6, 1886 [24 Stat. 123], all of the lands and rights to lands opposite the uncompleted portions of the Atlantic & Pacific railroad were forfeited to the United States and restored to the public domain.

The act of July 6, 1886, forfeiting the unearned part of the grant to the Atlantic & Pacific Railroad Company reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public land adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, heretofore granted to the Atlantic & Pacific Railroad Company by an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which

are adjacent to and coterminus with the uncompleted portions of the main line of said road, embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph be and the same are hereby declared forfeited and restored to the public domain."

At the time of the passage of the act of forfeiture of July 6, 1886, the Atlantic & Pacific company had completed about one-fourth of the entire railroad between Springfield, Missouri, and the Pacific. The company had completed that part between Isleta Junction, New Mexico, and the Colorado river and the balance of the line between Isleta Junction and Springfield, Missouri, and between the Colorado and the Pacific still remains uncompleted.

The tract of land for which this action is brought it situated opposite the uncompleted portion of the railroad. The claim of counsel for the Atlantic & Pacific company is that Congress did not have the constitutional power to forfeit the lands opposite the uncompleted portion of this railroad, for that by the act of April 20, 1871, it is now contended, a new contract was in effect entered into, between the United States and the company by which the United States postponed its right to forfeit the unearned lands until a time should arrive when the mortgage executed by the company, under the act of 1871, might be foreclosed, which time has not yet arrived.

Points and Authorities.

I.

Public Rights are Not Conferred or Surrendered by the Government by Implications.

If the act of April 20, 1871, is ambiguous, or open to more than one construction, the ambiguity will be resolved in favor the government and nothing will be deemed to be granted to the company, or relinquished by the United States unless clearly and unequivocally expressed, and nothing can pass by mere implication.

Charles Bridge *v.* Warren Bridge, 11 Pet. 420;

Pullman Company *v.* Central Transportation Company, 139 U. S. 24;
St. Louis Railroad *v.* Terre Haute Railroad, 145 U. S. 393;
Memphis Railroad *v.* Berry, 112 U. S. 609;
Maine Railroad *v.* Maine, 96 U. S. 499;
Chesapeake Railroad *v.* Miller, 114 U. S. 176;
Louisville Water Co. *v.* Clark, 143 U. S. 1;
Oregon Railroad *v.* Oregonian Railroad, 130 U. S. 1;
Rice *v.* Railroad, 66 U. S. 358;
Holyoke Water Co. *v.* Lyman, 15 Wall. 500;
Stein *v.* Bienville Water Co., 141 U. S. 67;
The Binghampton Bridge case, 70 U. S. 51;
Coosaw Mining Co *v.* South Carolina, 144 U. S. 550;
Slidell *v.* Grandjean, 111, U. S. 412, 438.

II.

Effect Must be Given to the Intention of Congress.

a. That congress did not *intend* to indefinitely abandon its right to forfeit this land grant for a failure to construct the railroad was in effect decided by this court in United States *v.* Southern Pacific Railroad, 146 U. S. 570, 615, where the court referred to the act of April 20, 1871, and commented upon its effect.

It is true that in the case in 146 U. S., it was not shown by the record that a mortgage had in fact been made by the company, but that fact might have been fairly presumed from the act of April 20, 1871, itself, which contemplated the execution of such a mortgage.

In that case the court said: [See 146 U. S. 604, 607.]

"Neither can it fairly be said that it was the intent of Congress that these lands should pass conditionally to the Southern Pacific company. Good faith must be imputed to Congress. It cannot be supposed that Congress intended to give to the Southern Pacific company that which it had already given to the Atlantic & Pacific company. *It knew that it had granted lands to the Atlantic and Pacific for a road to the Pacific ocean, and that that company was then engaged in constructing its road, and proceeding with as much rapidity as other Pacific companies had done. Within little over a month from the date of this grant to the Southern Pacific com-*

pany, and on April 20, 1871, it gave to the Atlantic & Pacific company authority to issue bonds secured by a mortgage on its road, equipments, lands, franchises, privileges, etc."

* * * * * * *

"Our conclusions, therefore, are that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean, was filed by the Atlantic & Pacific company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the general government, and retaken for its own benefit."

If Congress by the act of April 20, 1871, contemplated and intended that the United States had thereby abandoned its right to forfeit and resume the Atlantic & Pacific grant for the failure to construct the road and had by that act granted to the Atlantic and Pacific company an absolute, indefeasible title in lieu of the conditional grant by the act of 1866 this court could not have reached the conclusion that,

"By that act of forfeiture the title of the Atlantic & Pacific was retaken by the general government, and retaken for its own benefit."

In all the land grant cases and other cases involving the construction of the Pacific railroad acts this court has declared again and again that effect must be given to the intent of Congress, and such construction and intent will not be defeated or changed by the happening or not happening of events not then in contemplation.

United States *v.* Stanford, 161 U. S. 412;

Railroad *v.* Forsythe, 159 U. S. 46;

United States *v.* Southern Pacific, 146 U. S. 570;

United States *v.* Northern Pacific, 152 U. S. 284.

This court therefore decided in the Southern Pacific case as a question of law, that the act of 1871 did not surrender the right of forfeiture for breach of the conditions subsequent.

The right and power of Congress to forfeit a railroad land grant for breach of the condition in failing to construct the road, declared in United States *v.* Southern Pacific Company, *supra*, has been reaffirmed in the following later cases.

United States *v.* Northern Pacific, 152 U. S. 284;
Lake Superior Railroad *v.* Cunningham, 155 U. S., 354;
Sioux City Railroad *v.* U. S., 159 U. S. 349.

(*b*) It is contended by the plaintiff in error that the effect of this act of April 20, 1871, was to *postpone* the time within which Congress could forfeit the grant for breach of condition *to the time of the foreclosure of the mortgage.*

The situation in 1871 was that Congress had made a grant of more than 50,000,000 acres of land to construct a transcontinental railroad by means of a public agency of the United States, for the transportation of the mails, troops and other govermental property.

The company which Congress had created for this purpose had been unable to construct the railroad in accordance with the act of 1866 or complete any considerable part of it. The company realizing this situation asked Congress for authority to mortgage its franchises and rights to unearned lands to secure further funds.

The charter of the company contained in the act of 1866 did not authorize the company to mortgage, transfer or alienate the railroad or any of its franchises or rights and in the absence of clear and explicit authority from Congress the company would have no power to do so.

United States *v.* Union Pacific Railroad, 160 U. S. 1, 32, 33, 37;

Pullman Company *v.* Central Company, 139 U. S. 24;
Oregon Railroad *v.* Oregonian Railroad, 130 U. S. 1;
St. Louis Railroad *v.* Railroad, 145 U. S. 393.

Congress was willing to authorize a mortgage to be made but did not intend to abandon the construction of the road or place that transcontinental railroad beyond its control. By the act of April 20, 1871, there was no limit of time for which the bonds of the company might run. The com-

pany could make those bonds payable in 50 years, in 500 years or in 5000 years as they might see fit. What Congress in effect said to the company was,

"You may mortgage your interest in the lands and rights to lands and your railroad and franchises to secure bonds which you may issue, but such mortgage shall cover only your interest in and rights which you possess to such lands, railroad and franchises, and in the event that such bonds shall be foreclosed for any reason, the rights of such mortgagees shall attach only to such railroad and lands coterminus with such railroad as shall have been *lawfully constructed in accordance with the act of 1866.*"

In granting to the company authority to mortgage its lands and rights to lands, the company knew, and congress knew, that the company held such lands upon a condition subsequent, which was, that fifty miles of railroad should be completed each year and the whole road should be completed by July 4, 1878, and all of these parties, as well as those who might purchase the bonds, knew that congress had the right to forfeit the grant if the company should fail to construct the railroad as provided by the act of 1866, and they all knew that Congress by section 20 of the act had also reserved the power to alter, amend or repeal the act.

The company did not have the power, under that act, to mortgage any lands which it did not possess or confer by that mortgage any rights which the company itself did not have. The act of 1871 only *purported* to authorize the company to mortgage its own lands and its own rights to lands.

There are two ways to read this act. The first is the way the company would have it read, as follows :

"That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act, shall extend only to so much thereof as shall be coterminus with or appertaining to that part of said road which shall have been constructed [*in disregard of the act of July 27, 1866*], at the time of the foreclosure of said mortgage."

What Congress evidently intended was that the act should be read as follows:

"That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act, shall extend only to so much thereof as shall be coterminus with or appertaining to that part of said road which shall have been constructed [*in accordance with the act of July 27, 1866*], at the time of the foreclosure of said mortgage."

The theory of the plaintiff in error is that Congress contemplated that the company would violate the act of 1866 and would proceed to construct the railroad in disregard of the law and after the grant had been forfeited by Congress.

The other construction which we contend for is that congress contemplated that the railroad should be constructed in accordance with the act of 1866, which required at least fifty miles to be constructed each year and the whole road by July 4, 1878, and by which act Congress further reserved the right to do any and all things needful to secure a speedy completion of the road and also reserved the power to alter, amend or repeal the act, and consequently when Congress referred to "*that part of said road which shall have been constructed*" it obviously meant so much of the railroad as should have been *lawfully constructed*.

To give the act of 1870 the construction contended for by counsel for plaintiff in error would result in utterly defeating the purposes of the act of 1866.

Here was a grant of 50,000,000 of acres extending on both sides of a proposed railroad for 2000 miles. A mortgage was attempted to be made of all the lands earned and unearned by the company. If a mortgage could be made and foreclosed which would take all of these lands, freed from the conditions upon which the grant was made, it is obvious that Congress could never secure the completion of the road, as there would be no possible object in the owners of the lands acquired under the foreclosure of the mortgage to complete

the railroad at all, as their title would be perfected without the expenditure of the money which would be required to construct such a road. By doing that, congress, *instead of securing the completion of the road,* would have passed an act which effectually prevented the completion of the road. The bonds might not have become due, or the mortgage be foreclosed for a thousand years.

The title of those lands would have passed in practical perpetuity to third parties, and there would have been no lands left to devote to the construction of that contemplated railroad.

As it is impossible for the court to give the construction to these acts contended for by counsel, excepting upon an unwarranted implication, it is submitted that such construction cannot be adopted, but that the court will keep in view the purposes of Congress in securing the completion of this railroad, and the rights reserved to Congress by the act of 1866, and will consider that the act of April 20, 1871, did not contemplate that the railroad should be constructed otherwise than in accordance with the act of 1866, subject to the right of Congress to forfeit the lands opposite the uncompleted portion, in order to secure the completion of the road; and further, that the act of 1871 did not contemplate that the company should mortgage any greater interest in the lands and road than the company itself possessed.

III.

The Acts of July 27, 1866, and of April 20, 1871, Being in Pari Materia Should Be Construed Together and Effect Given to All of the Parts.

The act of April 20, 1871, is upon the same subject as the act of July 27, 1866, both acts relating to the construction of the Atlantic & Pacific railroad for the benefit and use of the United States for military, postal, telegraph and other purposes. Both acts are to further the ultimate object sought to be attained by the construction of that national railroad, and both acts seek to protect the interests of the government.

The act of 1871 does not purport to repeal any of the provisions of the act of 1866; the acts are not in any way in conflict with each other, and repeals by implication are not favored.

By settled rules of construction, therefore, these acts should be construed and read together and effect should be given to all the parts.

United States *v.* Healey, 160 U. S. 136;
Frost *v.* Wenie, 157 U. S. 57;
Chicago Railroad *v.* United States, 127 U, S. 406;
District of Columbia *v.* Hutton, 143 U. S. 18;
United States *v.* Tynen, 11 Wall. 88;
Chew Heong *v.* United States, 112 U. S. 536.

Construing the acts this way, we read in section 8 of the act of 1866, that the grant to the Atlantic & Pacific company was upon a *condition*, which was that fifty miles should be constructed each year, and the whole road completed by July 4, 1878.

We further read in section 20 the provision, that Congress reserved the power to alter, amend or repeal the act.

We further find, that, by section 9 of the act, Congress further provided that the grants were conditional and by that act the United States in effect reserved the right to forfeit the grant for the failure of the company to construct the road.

None of these provisions is repealed by the act of April 20, 1871, and the effect of that act was to authorize the company to do what it had no power to do before, viz: to mortgage its interest in the railroad, and lands and not the interest of the United States.

Instead of surrendering its right to forfeit the grant, that act was intended to restrict and limit the powers of the Atlantic & Pacific company, and by that act the company was only authorized to mortgage such lands as it had lawfully earned, that is, those lands which were opposite the constructed part of the railroad, obviously that part of the railroad which had been lawfully constructed in accordance with the act of 1866.

In conclusion it is submitted that the judgment of the Supreme Court of New Mexico should be affirmed.

Submitted,

JOSEPH H. CALL,
Special United States Attorney.